No. 89800-6

SUPREME COURT OF THE STATE OF WASHINGTON

No. 69157-1

COURT OF APPEALS, DIVISION I
OF THE STATE OF WASHINGTON

ARTHUR LANE, JOHN ALLERTON and KENNETH GOROHOFF,

Appellants,

v.

PORT OF SEATTLE; KING COUNTY; BNSF RAILWAY COMPANY; GNP RLY, INC.; and CITY OF REDMOND,

Respondents.

RESPONDENT PORT OF SEATTLE'S ANSWER TO PETITION FOR REVIEW

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I. INTRODUCTION

The Court of Appeals correctly affirmed the grant of summary judgment for Respondent Port of Seattle ("the Port") because the Port lawfully acquired the Eastside Rail Corridor ("ERC") under the plain language of several applicable state statutes. The Court of Appeals properly held that the Port's decision to purchase the ERC was "within its statutory powers" under RCW 53.08.010, RCW 53.08.290, and RCW 53.08.245 and not *ultra vires*; and that the Port Commission's decision to purchase the ERC was "quasi-legislative in nature" subject to review "only to determine if it is arbitrary, capricious, or contrary to law." *Slip Op.* at 15.[1]

There is no basis for this Court to accept discretionary review of the Court of Appeals' well-reasoned decision.[2] Appellants rely on RAP 13.4(b)(1) and (4), but the decision below neither "conflict[s] with a decision of" this Court, nor "involves an issue of substantial public interest that should be determined by the Supreme Court." The Court of Appeals interpreted unambiguous statutes in a manner entirely consistent with this Court's prior decisions. Moreover, given the extensive four-year public

[1] Appellants have abandoned their claim that the Port's acquisition of the ECR was not reasonably necessary. *See Slip Op.* at 22-23 ("Given the highly deferential standard of review, the plaintiffs' challenge to the resolution on reasonable necessity must fail.").

[2] This Court previously rejected Appellants' request for direct review of this case on grounds virtually identical to those presented by the Appellants in this petition. *See* Order (No. 86894-8, Aug. 7, 2012).

decision-making process, the thorough review already undertaken by the trial and appellate courts, and the fact that this case is pursued by three individuals whose interests – as the trial court found – conflict with the interests of other Port taxpayers,[3] additional review is simply unwarranted.

Appellants claim that "[t]he central issue in this case is whether the Port of Seattle had statutory authority to purchase an obsolete and almost completely abandoned rail line,"[4] but in fact their claims of error are much narrower. The petition presents the following three questions:

1. Does RCW 53.08.290, which authorizes a port district to acquire rail facilities inside or outside a port district and imposes no requirement of a physical connection to existing port facilities, allow the Port to acquire a rail facility that the Port found necessary for its purposes, including the preservation of rail freight transport?

2. Does the Port's adoption of a resolution (that the purchase of the Snohomish County portion of the ERC was necessary) after the purchase closed, make the purchase *ultra vires*, when the undisputed record establishes that the Port Commission engaged in four years of

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[3] In denying class certification, the trial court stated: "I am convinced . . . 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 [i.e., taxpayers]." RP (10/6/11) 58:24 - 59:3.

[4] Appellants' Petition for Review ("Petition") at 1-2. The Port disputes this characterization, as the only evidence submitted (as both the trial court and Court of Appeals held) was that the ERC continues to be an active freight line for shipment of interstate cargo. *See* CP 5821-22; CP 5829; *Slip Op.* at 2.

careful deliberation about the acquisition before the purchase, and RCW 53.08.290 imposes no requirement specifying when the Port must adopt the resolution?

3. Was the Port's acquisition of the portion of the ERC referred to as the "Redmond Spur" for economic development purposes 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 Port subsequently sold the Redmond Spur to the City of Redmond to facilitate the City's development of its downtown core?[5]

II. STATEMENT OF THE CASE

The Port of Seattle is the oldest port district in the State of Washington, formed in 1911. For more than a century, the Port has been involved in a wide range of activities to foster economic development throughout the region. The Port is a key economic engine in the Puget Sound region. It owns and operates cargo and airport facilities, marinas, grain terminals, conference facilities, and four thousand acres of industrial and commercial property.[6]

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[5] In seeking review, Appellants no longer cite the portion of the statute added after the ERC was acquired. *Compare* Petition at 17-19 *with* Appellants' Brief at 28-29 (April 6, 2012). *See infra* note 31.

[6] CP 1391-93.

In May 2008, the Port entered into an agreement for the Port to acquire the ERC from Burlington Northern Santa Fe Railway Company ("BNSF") for $81 million; the transaction closed in December 2009. The ERC is a 42-mile rail line running through King and Snohomish Counties.[7] The part of the ERC referred to as the Southern Portion is located within King County. The remaining portion, which includes the Redmond Spur, is referred to as the Northern Portion and is located in both King County and Snohomish County.[8] The Redmond Spur branches east off the main line and extends south to the City of Redmond. The Redmond Spur is located entirely in King County.

The Northern Portion, with the exception of the Redmond Spur, is used as an active freight railway operated by local rail operator respondent GNP RLY, Inc.[9] The Southern Portion and the Redmond Spur are not currently used for freight transport, so the parties agreed to rail bank the line under 16 U.S.C. § 1247(d), which requires the line to be used as a trail to prevent abandonment of the railroad right-of-way (and consequent reversion of ownership to adjacent property owners) and to ensure that the corridor remains available for future transportation and freight purposes.[10]

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[7] *See* CP 1415 (reprinted at Appendix A-1).

[8] CP 1396.

[9] CP 1400; 1412; 1890-1943.

[10] CP 1397-98.

Appellants seek to rescind only part of the overall transaction – the Northern Portion – but the Port acquired the entire ERC in a single, interdependent transaction, as both the trial court and the Court of Appeals properly concluded.[11] Extensive and undisputed evidence in the trial court established that the Port's primary intent in acquiring the entire ERC was to preserve it as an irreplaceable regional transportation corridor.[12] The Port Commission concluded that preserving the entire ERC also helps the Port respond to increased competition from other ports and changing trade patterns.[13] Preserving the ERC provides another rail route to access the interstate railroad system from a part of the region not currently well-served by rail, and helps the region guard against natural disasters.[14]

III. ARGUMENT

The Court of Appeals properly held that a straightforward reading of the applicable statutes authorized the Port to acquire the ERC. There simply is no basis for further appellate review of the Court of Appeals' holding, which is consistent with this Court's prior decisions regarding the scope of the Port's authority.

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[11] CP 1395-98. The transaction was broken into two parts, with the Port purchasing the Northern Portion and BNSF donating to the Port the Southern Portion, which the Court of Appeals described as "a single, interdependent transaction." *Slip Op.* at 3.

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

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

[14] *Id.*

A. The Decision of the Court of Appeals is Consistent with This Court's Prior Decisions.

Although Appellants cite RAP 13.4(b)(1) as a basis for discretionary review, RAP 13.4(b)(1) permits review only when the decision below is "in conflict with a decision of" this Court. Appellants fail to cite any decision of this Court that is in tension with (let alone contrary to) the Court of Appeals' decision. Instead, Appellants merely cite authority for the general and unremarkable proposition that the Port must have statutory authority to act, *Hughbanks v. Port of Seattle*, 193 Wash. 498, 76 P.2d 603 (1938), and that the powers of the Port are limited to those expressly granted or "fairly implied in or incidental or essential to the powers granted," *Port of Seattle v. Washington Utils. & Transp. Comm'n*, 92 Wn.2d 789, 794-95, 597 P.2d 383 (1979). Contrary to Appellants' assertions, this Court in *State ex rel. Huggins v. Bridges*, 97 Wash. 553, 166 P. 780 (1917), did not hold that the "Port cannot acquire rail facilities absent express authority to do so." Rather, the Court held that the statute as then-written (nearly one hundred years ago) did not grant ports the power to operate a railway line as a common carrier.[15] *Id.* at 559.

[15] The Port does not operate and has not operated a rail line on any portion of the ERC. After *Huggins* was decided, the legislature amended the statutes to give port districts the authority to own and operate belt line railways. *See* RCW 53.08.020.

In fact, the Court of Appeals' decision is consistent with every Supreme Court decision discussing the powers of the Port, because it is based on the plain meaning of the statutes conferring on the Port authority to acquire rail facilities.

1. The Port may acquire rail facilities not physically connected to existing Port facilities.

The Court of Appeals properly rejected Appellants' principal argument, that the Port may acquire only rail facilities physically connected to existing port facilities. As the Court of Appeals properly noted, RCW 53.08.290 "conveys a plain meaning. It authorizes a port district to acquire a rail line for the movement of cargo. [It] contains no requirement that the rail line acquired must have a physical connection with already existing port facilities." *Slip Op.* at 14-15. This holding is a straightforward statutory interpretation and not contrary to any decision of this Court.

RCW 53.08.290 provides:

> 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 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 manufacture 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 a port's existing harbor and airport facilities, or to facilities that handle "intermodal" movement of cargo as Appellants define it.[16] Appellants' argument to the contrary is unsupported by the statute.[17]

RCW 53.08.290 contains two independent provisions, each addressing a different subject. The first sentence, ending with the first

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[16] 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, including rail and truck transport. *See Washington State Dep't Transp.*, Rail Terminology, www.wsdot.wa.gov/Freight/Rail/terms.htm (defining "intermodal" as using "different types of transportation modes to move freight shipments and people, *i.e.*, ships, trains, buses, and trucks"). As the trial court held, the freight traffic currently moved on the Northern Portion of the ERC is intermodal freight. CP 5829.

[17] Likewise, the legislative history supports the plain meaning of the statute. *See Slip Op.* at n.3.

proviso, confers on ports the general authority to engage in "any necessary activities related to the intermodal movement" of cargo. Only that provision contains the "intermodal" and "in connection with" language.[18] 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 district. The second sentence refers to neither "intermodal" cargo, nor any particular use.

Appellants claim that their interpretation of Section .290 is supported by the "purpose" statement in the 1980 act, which provides that "[t]he purpose of this act is to . . . [c]larify existing law as to the authority of port districts to perform certain cargo movement activities and to contract for or otherwise provide facilities for rail service for the movement of such cargo." Laws of 1980, ch. 110, § 1(1). But this purpose statement does not refer to intermodal uses, nor does it require that rail facilities be physically connected to an airport or harbor facility. Instead, this introductory language reflects the obvious point that the rail service permitted by the statute is for the movement of cargo, as opposed to passengers. There is no basis to read the word "intermodal," used in a

[18] Plaintiffs also rely on an unnaturally narrow interpretation of the phrase "in connection with" to require a physical connection. The trial and appellate courts properly rejected that argument. *See* CP 5828; *Slip Op.* at 14-15.

later portion of the Act, into the purpose statement.

Appellants' interpretation also disregards the statute's structure. Reading "intermodal" into the second sentence would make that sentence surplus,[19] because the statute's first sentence already grants ports full authority to perform all necessary activities related to intermodal cargo.[20] A port's full authority to perform intermodal cargo activities is contained in one sentence, with one proviso clause. A port's authority to also acquire rail lines is contained in a second sentence, with two proviso clauses. The two provisions pertain to different topics, with different scope and effect, and are independent of one another.

The Court of Appeals undertook a straightforward analysis of the statute and concluded that the meaning of the statute was plain. That decision was consistent with basic tenets of statutory construction and prior decisions of this Court.

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[19] *See, e.g., State v. Roggenkamp*, 153 Wn.2d 614, 624, 106 P.3d 196 (2005): "Statutes must be interpreted and construed so that all the language used is given effect, with no portion rendered meaningless or superfluous."

[20] Even if Appellants' interpretation were correct, the Northern Portion that is within the Port district itself is a facility currently used to transport intermodal cargo, and the Snohomish County segment – necessary to link the King County segment to an interstate rail line – is being used "in connection with" the operation of that facility. While the appellate court did not need to reach that conclusion, the trial court did: "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." CP 5829.

2. The Port's adoption of the resolution after the purchase was proper and not *ultra vires*.

The Court of Appeals' decision also comports with this Court's prior decisions regarding the application of the doctrine of *ultra vires*. RCW 53.08.290 allows a port to acquire rail facilities outside a port district upon a port commission resolution that the rail facilities are "reasonably necessary" to link the rail facilities within the port district to the interstate rail system. The Port adopted such a resolution,[21] which the trial court found was supported by ample deliberation.[22]

Appellants claim that the Court of Appeals' decision conflicts with *State ex rel. Keeler v. Port of Peninsula*, 89 Wn.2d 764, 575 P.2d 713 (1978). This 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. *Keeler*, however, was decided in 1978. Two years later, in 1980, the legislature enacted RCW 53.08.290, allowing a Port to expand its operation outside its physical boundaries. *Keeler* is irrelevant as it did not deal with the statutory authority on which the Port relied.

The question, then, is whether the Port's purchase was *ultra vires* in light of the fact that the Port adopted the resolution after the purchase

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[21] Resolution 3639 was adopted on August 3, 2010. CP 1403.

[22] CP 5836.

closed, rather than before. The Court of Appeals applied settled law to the undisputed facts of the case and agreed with the trial court that it did not.

The Court of Appeals properly applied this Court's *ultra vires* precedents of *Noel v. Cole*, 98 Wn.2d 375, 655 P.2d 245 (1982), and *South Tacoma Way, LLC v. State*, 169 Wn.2d 118, 233 P.3d 871 (2010). The Court held that "[t]he statutory requirement for a formal resolution by the port commission is intended to ensure careful deliberation," and found that the "purchase was addressed numerous times in public meetings of the port commission before the deal was finalized." The Court of Appeals "conclude[d] that the port commission fulfilled the statutory purpose of carefully considering whether the purchase was reasonably necessary," and the "failure to adopt a formal resolution until after the transaction closed did not render the purchase *ultra vires*." *Slip Op.* at 14-15. This was a straightforward application of this Court's precedent, not a decision in conflict with that precedent.

As the Court of Appeals noted, this Court has held that there is "a distinction between government acts that are *ultra vires* and those acts that suffer from some procedural irregularity." *South Tacoma Way*, 169 Wn.2d at 122; *Slip Op.* at 13. An act is *ultra vires* and therefore void "if performed with no legal authority"; if so, "no power to act existed, even where proper procedural requirements are followed." *Id.* at 123. For

instance, in *Noel*, the agency failed to prepare an environmental impact statement required by the State Environmental Policy Act. That failure thwarted the central purpose of the law, that is, to ensure environmental impacts were considered prior to acting, because the preparation of an environmental impact statement is the consideration of environmental impacts. *Noel*, 98 Wn.2d at 380 ("[t]he *ultra vires* doctrine is . . . necessary to prevent ill considered environmental action"). By contrast, in *South Tacoma Way*, the agency failed to give required notice of a sale to abutting landowners. *South Tacoma Way*, 169 Wn.2d at 121. Finding that the rule was meant to avoid fraud or collusion – neither of which was claimed – this Court held the lack of notice did not render the sale illegal or unenforceable. *Id.* at 126.

Here, as the trial and appellate courts independently held, the uncontested evidence was that the Port's adoption of the resolution met the statutory purpose of RCW 53.08.290. As the Court of Appeals stated, "The statutory requirement for a formal resolution by the port commission is intended to ensure careful deliberation about whether a proposed acquisition of rail facilities outside the district is genuinely necessary to link up to an interstate rail system." *Slip Op.* at 14. Here, it is obvious from looking at a map of the ERC that the Snohomish County portion is

necessary to link the King County portion to the interstate rail system.[23] The Court of Appeals noted the extensive and lengthy public process and the "careful considerat[ion]" the Port engaged in in deciding whether the purchase was necessary. *Id.* at 14-15. The court was satisfied that the uncontested evidence established as a matter of law that the Port did not act *ultra vires*. Moreover, the trial court noted that, unlike the statute at issue in *Noel*, RCW 53.08.290 does not require that the finding take place before the acquisition occurs.[24]

As the undisputed record reflects, the Port Commission comprehensively deliberated the ERC acquisition (including the extraterritorial portion in Snohomish County) over a four-year period. The Commission engaged in extensive public outreach and held fourteen separate meetings in which it solicited and received public testimony and discussed the acquisition.[25] On three occasions in those four years (all before the transaction closed), the Commission adopted resolutions authorizing the Port CEO to proceed with the acquisition.[26] The

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[23] *See* CP 1415 (reprinted at Appendix A-1).

[24] CP 5836-37.

[25] CP 2160; 2169-2325; 1395.

[26] 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 1844-46. 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

Commission then passed Resolution 3639, which stated that the extraterritorial segment was "reasonably necessary to link the rail . . . facilities within the port district to an interstate railroad system."[27]

The appellate court applied settled precedent of this Court in holding that the purchase was not *ultra vires*, making further review unwarranted.

3. The Port lawfully acquired the Redmond Spur.

Appellants fail to cite any decision of this Court that conflicts with the Court of Appeals' holding that the Port lawfully acquired the Redmond Spur. The Redmond Spur indisputably is "land" or "property" purchased for the Port's purposes (as permitted by RCW 53.08.010), including the purpose of selling it to the City of Redmond for economic development (pursuant to RCW 53.08.245).

Appellants claim that the 1917 case of *State ex rel. Huggins v. Bridges*, 97 Wash. 553, 166 P. 780 (1917), precludes the application of RCW 53.08.010 to the acquisition of rail lines. Reliance on *Huggins* is misplaced; *Huggins* addressed whether a Port could construct and operate a railroad as a common carrier. Operation of a rail line is not at issue here. Instead, the Port acquired the Redmond Spur as part of the overall

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the CEO to execute all agreements necessary to complete the Corridor's acquisition. CP 1875-88.

[27] CP 1403; 1417-19.

purchase of the ERC, which preserved the corridor for future transportation and economic development purposes.[28] Moreover, as the Court of Appeals noted, in the years since *Huggins*, "the statutory powers of port districts have grown." *Slip Op.* at 22.[29]

Citing *State ex rel. Gorton v. Port of Walla Walla*, 81 Wn.2d 872, 877, 505 P.2d 796 (1973), the Court of Appeals held that RCW 53.08.010 "permits a port district to acquire any land or property within its boundaries that it deems necessary for its purposes, including land for which the Port may have no identified plan." *Slip Op.* at 20. Given that "[o]ne of the statutorily approved purposes of port districts is economic development" under RCW 53.08.245(1) (enacted after *Huggins* was decided), and noting the "impressive documentation" of economic development expected by acquisition of the Redmond Spur,[30] the court held that purchase of the Redmond Spur was authorized. *Slip Op.* at 20-23.

BNSF did not offer the ERC for sale without the Redmond Spur.

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[28] CP 1399.

[29] As noted above, *supra* note 15, after *Huggins*, the legislature amended RCW 53.08.020, authorizing port districts to own and operate belt line railways.

[30] The City of 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 Redmond's economic growth. CP 2349, 2351-56. The Port hereby incorporates the City of Redmond's Answer, filed January 22, 2014, in response to Appellants' motion.

Acquisition of the Redmond Spur (and the rest of the ERC) for economic development was authorized by RCW 53.08.245, which unambiguously states that "[i]t shall be in the public purpose for all port districts to engage in economic development programs."[31]

Moreover, Washington law expresses a strong public policy favoring the acquisition of railroad properties for development and other uses in the "public interest of the state," RCW 64.04.180,[32] and provides that "the state, counties, local communities, ports, railroads, labor, and shippers all benefit from continuation of rail service and should participate in its preservation," RCW 47.76.240. The acquisition of land has always been allowed "for [a port district's] purposes" under RCW 53.08.010. With the enactment of RCW 53.08.245, "a port district's purposes" now include the statutory purpose of economic development. Whether read together or applied separately, RCW 53.08.010 and .245 granted the Port

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[31] The statute later was amended, adding permissive language about types of economic development programs. *See* Laws of 2010, ch. 195, § 1(2)(a). Appellants argue vaguely that the word "programs" in "economic development programs" means that the activity funded must be something more (they do not define what more is required) than the economic development engaged in by the City of Redmond. *See* Petition at 18-19. The Court of Appeals rejected this "something more" argument. *Slip Op.* at 22. "Program" (in this context) is defined as "a plan or system under which action may be taken toward a goal." WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY (1986). The City of Redmond's development of the Redmond Spur meets that definition.

[32] 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 ERCs, 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.

the authority to acquire the Redmond Spur.

B. This Case No Longer Involves an Issue of Substantial Public Interest That Should Be Determined by This Court.

In a cursory discussion, Appellants argue that the "issue of substantial public interest" (warranting review under RAP 13.4(b)(4)) is "[w]hether the Port's expenditure of such a large amount of taxpayer-supplied funds was legally permissible." Petition at 19-20. But Appellants cite no facts or law to indicate why this Court should review a carefully considered, quasi-legislative decision by elected Port commissioners merely because substantial funds were involved. As the Court of Appeals aptly observed, Appellants' remedy is at the ballot box. *Slip Op.* at 18.

Whether an issue is of "substantial public interest" involves a more careful analysis. *See, e.g., State v. Watson*, 155 Wn.2d 574, 122 P.3d 903 (2005).[33] Typically, this Court reserves review under this prong for issues that are likely to recur. *Id.* The whole point of the ERC purchase was that it was a once in a lifetime opportunity – an opportunity that state law urges port districts to embrace – to preserve an irreplaceable asset. It is inconceivable that, if lost, this region could again create a corridor like the

[33] For example, in *Watson*, this Court found RAP 13.4(b)(4) applicable: "This case presents a prime example of an issue of substantial public interest. The Court of Appeals holding . . . has the potential to affect every sentencing in Pierce County . . . where a DOSA sentence was or is at issue." *Id.* at 577.

ERC. The Port Commission recognized the opportunity, deliberated about its impact on the region, and acted. As the trial court correctly held, Washington law affords the Port significant discretion to make quasi-legislative decisions like the acquisition of the ERC.[34]

Appellants have raised only three questions for review, each involving straightforward questions of statutory interpretation and application of settled principles of law. RAP 13.4(b)(4) does not support a conclusory attack on the ERC purchase with no supporting facts, law, or analysis, simply because the sum the Port initially invested in the transaction was large.

Even under Appellants' view of the "public interest," however, the Port's acquisition of the ERC no longer is "substantial." From the time the Port acquired the ERC over four years ago, the Port has sold nearly all of the ERC to its regional partners and recouped a substantial portion of its original outlay.[35] The Port has sold portions of the ERC to the City of Redmond, King County, Sound Transit, and the City of Kirkland. It also has sold comprehensive easements to Puget Sound Energy and Sound Transit. More recently, the Port is in the process of selling a portion of the

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[34] Appellants abandoned the general claim that the expenditure was arbitrary and capricious amounting to fraud. *See supra* note 1 and accompanying text.

[35] Given the rail-banking and the structure of the agreements, the ERC remains available for future use as a rail line.

ERC to Snohomish County. As a result of these transactions, the Port will have recouped nearly all of its original $81 million outlay.[36]

Under these circumstances, where the claim is being pursued by three individuals who failed to participate in the public process when the Port was deliberating the ERC purchase, and whose interests are contrary to the Port's taxpayers,[37] the real "public interest" that exists is the public's interest in providing finality to the Port Commission's decision and the ERC purchase.

IV. CONCLUSION

For the above stated reasons, this Court should deny Appellants' Petition for Review.

Respectfully submitted this 22nd day of January, 2014.

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By /s/ Randall Thomsen

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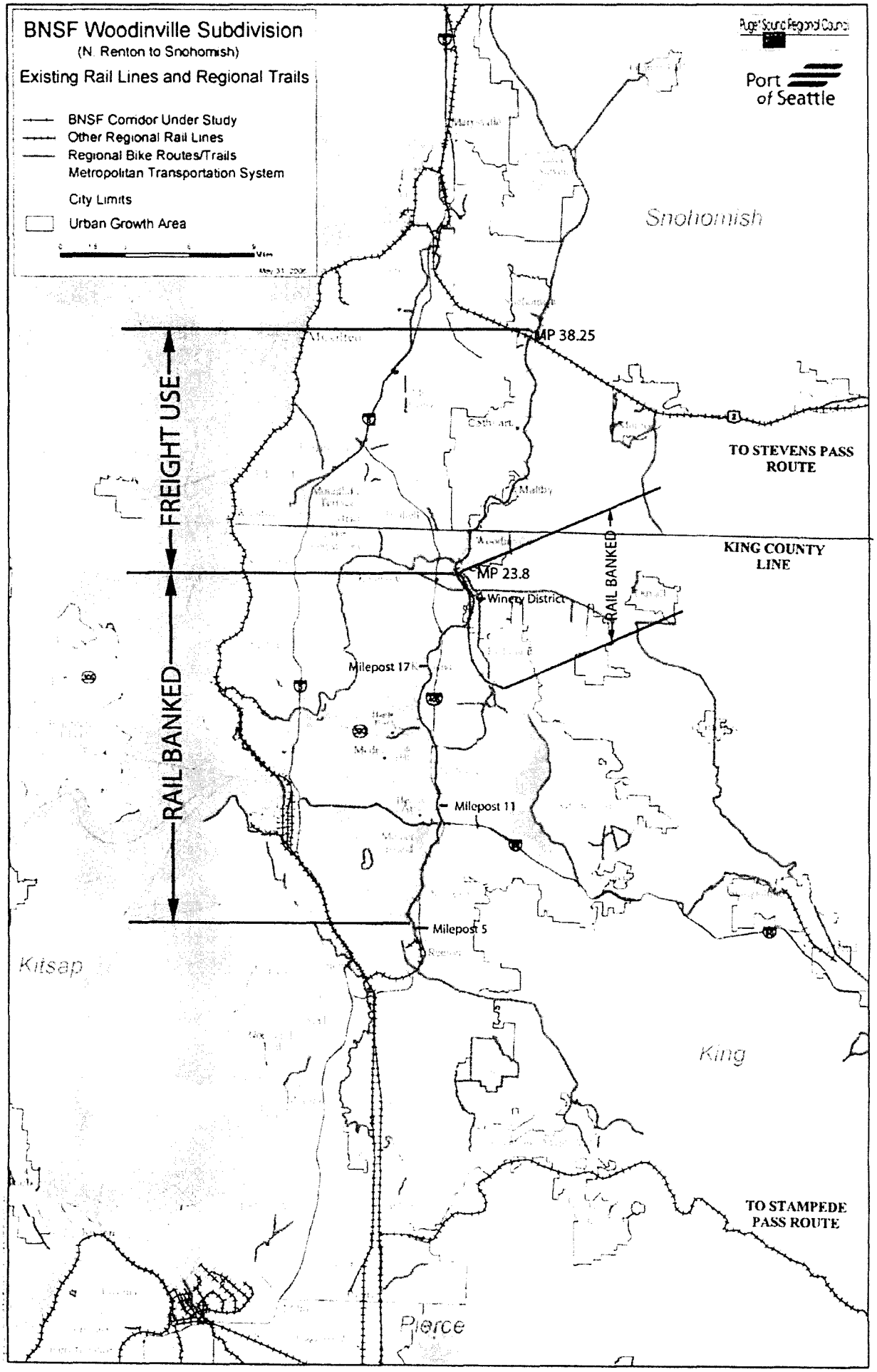
[36] In June 2010, the City of Redmond paid the Port $10 million to purchase 3.9 miles of the Redmond Spur. In December 2010, Puget Sound Energy paid the Port $13.8 million for a utility easement along the length of the ERC. CP 1401, 1945-2063. In April 2012, Sound Transit paid the Port $13.8 million for a transportation easement in the Southern Portion and the Redmond Spur, plus a fee interest in one mile of the ERC 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. In February 2013, King County acquired the Southern Portion for a purchase price of $15.8 million. CP 1401; 1671-1839. Just recently, in January 2014, Snohomish County agreed to acquire that portion of the ERC north of the City of Woodinville, including the entire portion in Snohomish County, for $5 million.

[37] *See supra* note 3 and accompanying text.

APPENDIX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Pierce

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Subject: Lane, et al v. Port of Seattle, et al - Court of Appeals No. 69157-1
Attachments: 01.22.14 POS Answer to Petition for Review.pdf; 01.22.14 POS Answer to Petition for Review - CSV.pdf

Attached for filing please find *Respondent Port of Seattle's Answer to Petition for Review* with *Certificate of Service*. Hard copy to follow via messenger to Messrs. Jurca and Bagshaw only, thank you.

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