89800-6

No. 69157-1-I

WASHINGTON COURT OF APPEALS
DIVISION I

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.

APPELLANTS' PETITION FOR REVIEW

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I. IDENTITY OF PETITIONERS

The petitioners are Arthur Lane, John Allerton, and Kenneth Gorohoff. They reside in Seattle and are Port of Seattle taxpayers. They were plaintiffs in the trial court and appellants in the Court of Appeals.

II. COURT OF APPEALS DECISION

Petitioners seek review of the decision of Division One of the Court of Appeals, filed on November 25, 2013, rejecting their claim that the Port of Seattle lacked legal authority to purchase the "northern portion" of the Eastside Rail Corridor, a defunct rail line east of Lake Washington that runs from Renton to Snohomish, with a spur line into Redmond. A copy of that decision is attached as Appendix A. Under the reasoning of the Court of Appeals, port districts would have unfettered authority to acquire rail lines and to engage in any economic activity, regardless of whether the rail lines or economic activity had any relation to other port functions, such as moving cargo to or from the port's docks. This position would dramatically expand port district authority beyond the limits set by the legislature and by prior decisions of this Court.

III. ISSUES PRESENTED FOR REVIEW

The central issue in this case is whether the Port of Seattle had statutory authority to purchase an obsolete and almost completely abandoned rail line having nothing to do with the movement of cargo to or from Port facilities. That central issue raises these three questions:

1. Can a port district acquire a rail line within its district that is not used for moving Port cargo, despite the legislature's stated intention that a port is authorized to acquire rail lines only for transporting cargo into or out of port facilities? *See* Laws of 1980, ch.110 (Appendix C).

2. Can a port district buy a rail line outside the district without making the statutorily-required finding of necessity before it makes the purchase? *See* RCW 53.08.290.

3. Can a port district buy a rail line simply because it thinks the purchase will help the general economy, regardless of whether the purchase would be allowed under statutes specifically enacted to govern a port's acquisition of rail facilities?

IV. STATEMENT OF THE CASE

This is an action brought by three taxpayers of the Port of Seattle seeking rescission of the Port's purchase of the "northern portion" of the Eastside Rail Corridor from BNSF Railway Company for $81,449,000. Named as defendants along with the Port are BNSF, King County, the City of Redmond, and GNP RLY, Inc., all of whom have or had interests potentially affected by the relief the taxpayers seek.

On cross-motions for summary judgment, the King County Superior Court dismissed the taxpayers' claims. The taxpayers appealed, and Division One affirmed.

A. The Rail Line and the Port's Purchase.

In 2003, BNSF determined that the Eastside Rail Corridor — a narrow, rickety, century-old, single-track rail line — was obsolete and should be sold. CP 98, 442-43, 679-83. The Corridor runs from Renton in King County to Snohomish in Snohomish County, and it includes a spur line that runs from Woodinville to Redmond in King County. *See* Appendix B (Map of Corridor). King County wanted to acquire the Corridor to turn it into what it called the "granddaddy of all regional trails," but eventually its efforts stalled due to lack of funds. CP 393-94. The Port then stepped in to make the purchase, not because it had any use for the rail line but simply because it had money, *i.e.*, "the right to raise the property tax without a vote, up to a pretty high level." CP 499.

In December 2009, the Port purchased the northern portion of the Corridor (running from Woodinville to Snohomish, plus the Redmond Spur) from BNSF for $81,449,000. CP 586-609. At the same time, BNSF purportedly "donated" the southern portion (running from Renton to Woodinville) to the Port. BNSF has claimed a tax deduction of $326,161,990 for its "donation" of the southern portion. CP 96, 611-32.

The Port acquired the Corridor for use as a trail and for possible commuter rail use. As former Port Commissioner Bob Edwards said:

> This Corridor can become a spectacular new trail that our children, and our children's children will enjoy. . . . This Corridor could, one day, become part of a high-capacity rail system. When – and if – the citizens of this region decide they want transit here, the Corridor will be available. . . .

CP 702. Announcing in 2006 what was to be a plan for the Port to acquire the Corridor and swap it with King County for Boeing Field, Port CEO Mic Dinsmore said, simply: "The county would acquire BNSF's little-used rail right-of-way east of Lake Washington for use as a recreational trail." CP 581; *see* CP 639.

The Port, rather than King County, was to acquire the Corridor initially because it had the "right to raise property tax without a vote" and the County did not. As former Port Commissioner Alec Fisken explained:

> [T]he Port is involved in this deal . . . because the Port has money... and King County doesn't. We have money... which is your money, we collect taxes in King County and we have the right to raise the property tax without a vote, up to a pretty high level, and that makes us (the Port) a really attractive Partner in a transaction like this.

CP 499. But the proposed exchange fell apart before the purchase closed.

By the time the Port acquired the Corridor in late 2009, all rail traffic had ceased on the southern portion and on the Redmond Spur; the rails, a rail tunnel, and a bridge had been removed on part of the southern portion near Bellevue to facilitate the expansion of I-405. CP 126-27, 278, 308, 759-60. This break in the line isolates the northern portion and prevents the Corridor from being used to move cargo between the Port's waterfront docks or its airport and the interstate rail system. Neither the Port, nor anyone else, has plans to replace this missing link to enable the line to be used to carry cargo into or out of the Port's docks or its airport.

Occasional freight rail traffic continues to run on the northern part of the line between Woodinville and Snohomish, but at a very low volume — little more than one car per week to a Woodinville distributor, the only King County shipper using the line. CP 278-82, 308. Respondent GNP, a small rail carrier that contracted to run that freight service after the Port's purchase, was unable to make a go of it with so little traffic and has since been liquidated in bankruptcy court. *See* CP 4788-89.

This action concerns only the Port's purchase of the northern portion of the Corridor. The taxpayers do not challenge the railroad's donation of the southern portion of the Corridor to the Port, since taxpayer funds were not used for that transaction.[1]

Since acquiring the Corridor, the Port has been parceling it out to various parties. First, it sold part of the Redmond Spur to the City of Redmond for use as a trail and for other non-freight rail uses, carefully

[1] Ports have had authority to receive donated land since 1921. Laws of 1921, ch. 39 § 4.

reserving in the sale documents a method for unwinding the transaction should the taxpayers prevail in this action. CP 571 (Redmond Purchase Agreement ¶ 6.2). The Port has subsequently sold other segments of the Corridor to Sound Transit and the City of Kirkland.[2]

B. Limitations on the Port's Authority.

The legislature has never given a port district general authority to own or acquire rail lines. The Port of Seattle was formed in 1911, and soon thereafter it sought to construct a belt line railway connecting various docks and warehouses on Elliott Bay. These efforts were challenged, and, after holding that "the power granted such creatures of the statute must be examined critically, carefully and strictly," this Court held that ports lack general authority to own or operate rail lines. *State ex rel. Huggins v. Bridges*, 97 Wash. 553, 555, 558-59, 166 P. 780 (1917).[3]

Later, this Court held that port districts were not generally authorized to own or operate any property outside their districts (even gifted land under RCW 53.08.110) because the legislature organized ports

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[2] Kirkland's interest become public during the pendency of this appeal. *See* http://seattletimes.nwsource.com/html/localnews/2017786443_triplett19m.html (last visited Dec. 19, 2013) (entitled "Kirkland city manager stumps for trail project along old rail line").

[3] Many years later, the legislature did give ports the authority to construct, purchase and operate "belt time" railways. Laws of 1961, ch. 126, § 1; *see* RCW 53.08.020.

solely to make improvements "within the district." *State ex rel. Keeler v. Port of Peninsula*, 89 Wn.2d 764, 767-68, 575 P.2d 713 (1978).

In 1980, the legislature granted ports limited authority to acquire rail lines and also to operate certain watercraft. That statute (Appendix C) provides in relevant part (with a 1981 amendment[4] to section 2 in italics):

> NEW SECTION. Section 1. The purpose of this act is to:
>
> (1) Clarify existing law as to the authority of port districts to perform <u>certain cargo movement activities</u> and to contract for or otherwise provide facilities for rail service <u>for the movement of such cargo</u> . . .
>
> NEW SECTION. Sec. 2. . . . :
>
> In addition to the other powers under this chapter, a port district, <u>in connection with the operation of facilities and improvements of the district,</u> may perform all necessary activities <u>related to the intermodal movement of interstate and foreign cargo</u>: 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;* . . .

[4] In 1981, the legislature amended the 1980 statute to allow a port to acquire rail lines outside its district if (but only if) the port finds by resolution that the extraterritorial lines are "reasonably necessary" to link the port's facilities within the district to the interstate rail system. Laws of 1981, ch. 47. (Appendix D).

Laws of 1980, ch.110 (emphasis added); Laws of 1981, ch. 47 (in italics); *see* RCW 53.08.290 (codifying section 2).

C. The Taxpayers' Claims.

The Port lacked authority, under RCW 53.08.290 or otherwise, to purchase the northern portion of the Corridor because the Port did not need it nor intend to use it to move cargo. There is no evidence in the record that the Corridor would be used for any movement of interstate or foreign intermodal cargo in "connection with the operation of the facilities and improvements of the district" — in other words, in connection with either the Port's harbor facilities or Sea-Tac airport.

The Port also acted without authority because it acquired the northern portion of the Corridor without making the finding of "reasonable necessity" required by the 1981 addition to the statute. The Port's district is coterminous with King County, and much of the northern portion of the Corridor is in Snohomish County, outside the Port's district.

The taxpayers commenced this action in July 2010. CP 1. After the complaint was served and seven months after the purchase was made, the Port hurriedly enacted a resolution that parroted the required statutory finding of necessity. CP 636. The Port's hearing on the resolution took only eight minutes — no evidence relevant to the finding was presented or considered. CP 164-65, 167-72.

The Port is not a general government. Petitioners ask this Court to hold the Port to the limited authority the legislature has granted to ports.

V. ARGUMENT

Under Division One's reasoning, all ports would be allowed to go into the railroad business independent of any port-related need to do so, and, indeed, would be allowed to undertake any business at all if it could be said that doing so would spur economic development. This would be a dramatic and unprecedented expansion of the limited authority granted to port districts by the legislature.

A. The Decision of the Court of Appeals Is Contrary to Prior Decisions of this Court.

Unlike counties and the State itself, ports are wholly "creatures of statute" whose authority exists only by virtue of specific legislative enactments. *Hughbanks v. Port of Seattle*, 193 Wash. 498, 504-05, 76 P.2d 603 (1938); *Donworth v. Port of Seattle*, 126 Wash. 465, 469, 218 P. 243 (1923). Thus, this Court has consistently held that where there is doubt about whether a port has authority to take action, that doubt must be resolved against the port. *Port of Seattle v. Wash. Utils. & Transp. Comm'n*, 92 Wn.2d 789, 794-95, 597 P.2d 383 (1979) (Port of Seattle lacks authority to operate airporter service to and from Sea-Tac airport).

Division One's exceedingly broad reading of the statutes governing port authority is in stark conflict with over a hundred years of this Court's decisions requiring a narrow construction of such statutes. This Court has consistently held that this Port cannot acquire rail facilities absent express authority to do so. *E.g., Port of Seattle*, 92 Wn.2d at 794-95; *Huggins*, 97 Wash. at 558-59. Consequently, this Court should accept review pursuant to RAP 13.4(b)(1) because "the decision of the Court of Appeals is in conflict with a decision of the Supreme Court."

1. Division One erred by holding that the purchase was authorized by RCW 53.08.290

In separate sentences within the same paragraph, RCW 53.08.290 gives a port district (i) the authority "in connection with the operation of facilities and improvements of the district . . . [to] perform all necessary activities related to the intermodal movement of interstate and foreign cargo" and (ii) the authority to "acquire, construct, purchase, lease, contract for, provide and operate rail services, equipment, and facilities." Reading the second sentence in isolation and disregarding the purpose clause of the statute, Division One held that the Port had authority to acquire rail facilities within its district regardless of whether those facilities were to be used in connection with the movement of the Port's cargo:

> Section 2 consists of two sentences. Each addresses a distinct topic. The first is the extent of a port district's authority to "perform all necessary activities related to the intermodal movement of interstate and foreign cargo." The second is the extent of a port district's authority to

> "acquire, construct, purchase, lease, contract for, provide, and operate rail services, equipment, and facilities."

Slip Op. at 7 (footnote omitted) (quoting Laws of 1980, ch. 110, § 2 (Appendix C)).

This reading is flatly contradicted by the enacting legislation. Although section 2 includes those phrases, in section 1 the legislature stated unambiguously that the two sentences do not address "distinct" topics but, rather, are interrelated:

> The purpose of this act is to: (1) Clarify 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 (Appendix C) (emphasis added).

That statement of purpose applies to both of the sentences codified in RCW 53.08.290 and treated by Division One as addressing "distinct" topics. In its declaration of the purpose of the statute, the legislature stated that the rail lines authorized by the second sentence of RCW 53.08.290 could be acquired only "for the movement of *such* cargo," that is, the "*certain cargo*" that the legislature referred to in the first sentence of the statute: "interstate and foreign [intermodal] cargo . . . [that is moved] in connection with the operation of facilities and improvements of the district." The two sentences of section 2 are joined by a common purpose: to provide a port with the authority to undertake all actions necessary to move its intermodal cargo, for example, cargo that arrives at a port's docks by ship (mode one) and leaves for its journey inland by rail (mode two), or *vice versa*. A port that cannot move its cargo off the dock to its final destination is of little use — RCW 53.08.290 was enacted to give a port a way to move its cargo from the port to the cargo's ultimate destination, not, as Division One erroneously held, to allow a port to acquire rail facilities independently of a port's cargo functions. The statute was most likely a response to the bankruptcy of the Milwaukee Road, which left some ports without any rail service. See footnote 6 and Appendix E.

Division One's construction of the statute goes far beyond the limited purpose intended by the legislature.[5] It not only flies in the face of the statute's purpose clause, it also runs counter to the firmly established holdings of this Court that the authority granted to ports is to be construed narrowly: "If there is a doubt as to whether a power is granted, it must be denied." *Port of Seattle*, 92 Wn.2d at 794-95 (Port lacks authority to provide airporter service); *State ex rel. Hill v. Port of Seattle*, 104 Wash. 634, 638-39, 641, 177 P. 671, 180 P. 137 (1919) (Port lacks authority to

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[5] RCW 53.08.290 did not create railroad districts; it facilitated a port's ability to move its cargo. Under Division One's reading of the statute, a port has *carte blanche* to go into the railroad business — to construct a rail line to deliver Woodinville wine to North Bend, or Newcastle coal to Bothell, or indeed to move any cargo from any point in King County to any other point, regardless of any connection to port operations.

go into the ice business independent of its harbor operations because "it was not the intention of the legislature to invest the port commissioners with a general power to do business away from its docks and terminals and wheresoever it pleased in the city of Seattle or in King county"); *Huggins*, 97 Wash. at 555 (the scope of the power granted a port "must be examined critically, carefully and strictly, and not with a disposition to strain the grant to find the power").

2. Division One erred by excusing the Port's failure to make the statutorily required finding of necessity prior to acquiring rail facilities outside the district.

In 1978, this Court held that a port district was not authorized to own any property outside the district because the legislature had provided for ports to be organized solely for the purpose of making improvements "within the district." *Keeler*, 89 Wn.2d at 767-68; *see* RCW 53.04.010. In 1981, the legislature amended RCW 53.08.290 to grant a narrow exception to this prohibition by authorizing a port to acquire rail facilities outside its district — but *only if* the port commissioners first found by resolution that the extraterritorial rail facilities were "reasonably necessary to link the rail . . . facilities within the port district to an interstate railroad system." Laws of 1981, ch. 47, § 1 (Appendix D).[6] Under that

[6] In the late 1970s, the "Milwaukee Road," one of the three great freight railways that once served Washington went bankrupt. At least one port in eastern Washington was served only by the Milwaukee Road and was stranded when its tracks went quiet. *See* CP

amendment, the Port was not authorized to acquire the Snohomish County portion of the Corridor unless it first made a finding that the acquisition was "reasonably necessary" to link its Elliott Bay dock facilities or Sea-Tac Airport to the interstate rail system.

The Port purchased the northern portion of the Corridor <u>without</u> making the statutorily required finding of necessity. Well after spending the money and making the purchase, and after being prompted by the filing of this lawsuit, the Port made a perfunctory finding after-the-fact, without debate and without considering any evidence. CP 1, 164-72, 636. Nevertheless, Division One held that paying this post-hoc lip service to the statutory requirement was sufficient to satisfy the legislative mandate for a finding of necessity:

> 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. The Port acted in accordance with that policy.

Slip Op. at 14.

Division One offered three generic statements from the record in support of its conclusion that prior to closing the purchase the Port gave "careful consideration" to its need for the Corridor to link to the interstate

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4440 (Appendix E). The statute gave that port the authority to acquire the track of the Milwaukee Road, including portions outside the port district, needed to put it back into operate so it could move the port's otherwise stranded cargo to market.

rail system. First, the court noted that in November 2007 the commissioners insisted that the following language be inserted in a memorandum of understanding:

> (A) A critical element to the competitiveness of the Port and King County, Washington in general, as well as the region, is the velocity and capacity of facilities and infrastructure for the transfer of international cargo from ships to freight trains and its movement to the ultimate customer;
>
> (B) The Port desires to acquire and preserve the [Corridor] as a rail and transportation Corridor.

Slip Op. at 14-15 (quoting CP 1845). Second, the court noted that in a December 2007 meeting, the commissioners justified the purchase "as preserving 'a rail and transportation corridor; consistent with federal rail-banking requirements.'" Slip Op. at 15 (quoting CP 1858). Finally, the court noted that in meetings in 2008 the "commissioners returned repeatedly to the goal of preserving the rail Corridor for freight and transportation issues." Slip Op. at 15.

From this evidence alone, the court held that "the port commission fulfilled the statutory purpose of carefully considering whether the purchase was reasonably necessary to link rail services within the port district to the interstate system." Slip Op. at 15. But "linking" to the "interstate system" is not even mentioned in the three generic statements quoted by the court, nor, indeed, is it mentioned anywhere else in the extensive record of proceedings prior to the Port's acquisition of the Corridor.

The statements quoted by the court support no more than the proposition that the commissioners wanted to preserve the Corridor for "transportation purposes" — a purpose that could include bicycle trails, foot-paths, local commuter rail, or a dinner train, and, perhaps, freight service. But there is no evidence that prior to this lawsuit being filed the commissioners ever considered whether the Port needed the line to link Port rail facilities to the interstate system, not to mention whether they ever made a *sub silentio* finding of any such need prior to making the purchase, as the court erroneously suggested they did.

Division One also misread *South Tacoma Way, LLC v. State*, 169 Wn.2d 118, 233 P.3d 871 (2010), in concluding that the Port's failure to make the required finding before the purchase could be excused as a procedural misstep because the Port was "generally authorized" to acquire real estate. Slip Op. at 14. On the contrary, under *Keeler* the Port had no authority to acquire real estate outside of the district. 89 Wn.2d at 767-68. Only by complying with the requirements of RCW 53.08.290 would the Port gain the very specific and limited authority to acquire out-of-district rail facilities. Moreover, the Port, unlike the *State in South Tacoma Way*, is but a "creature of statute" without general authority to do anything absent compliance with the requirements set out in its authorizing statutes.

The Port Commission utterly failed to make any timely finding on the essential issue — the Port's need for the Corridor to link Port facilities to the interstate system. And by the time it made the finding, the northern portion no longer connected the Port's harbor or airport to the interstate system. Division One's holding that the Port was justified in proceeding despite its failure to comply with the statutory mandate was plain error.

3. Division One erred by holding that the Port had authority to acquire the Redmond Spur for the purpose of fostering economic development.

Division One correctly recognized that the purchase of the Redmond Spur could not be justified by RCW 53.08.290. Slip Op. at 20. Instead, to find that the Port had authority to buy the Redmond Spur the court relied upon RCW 53.08.010, which authorizes a port to "acquire . . . all lands, property, property rights, leases, or easements necessary for its purposes." Slip Op. at 23. The "purposes" for which the trial court and Division One found the Redmond Spur "necessary" were that purchasing the abandoned spur line would "'advance trade and commerce, promote industrial growth and stimulate economic development.'" *Id.*

Division One's holding that RCW 53.08.010 authorized the Port's purchase of the Redmond Spur ignores this Court's decision in *Huggins*.

The "necessary for its purposes" provision has been part of the law since 1911. *See* Laws of 1911, ch. 92, § 4. In fact, in 1917 this Court held in *Huggins* that the Port had no statutory authority to acquire any rail. 97 Wash. at 559. *Huggins* controls; RCW 53.08.010 did not authorize the Port to acquire rail in 1917, and it does not authorize it today.

Since 1917, the legislature has enacted very specific statutes authorizing port ownership of "belt line" railways and rail lines that serve a port's intermodal cargo traffic. *See* RCW 53.08.020; RCW 53.08.290. These statutes, not RCW 53.08.010, control on the issue of whether a port has authority to purchase a rail line: "[W]here there is a conflict between one statutory provision which deals with a subject in a general way and another provision which deals with the same subject in a specific manner, the latter will prevail." *Hama Hama Co. v. Shorelines Hearings Bd.*, 85 Wn.2d 441, 447, 536 P.2d 157 (1975).

The legislature has not given ports *carte blanche* to buy any rail line that might foster economic development in some vague or tenuous way. Based on a citation to RCW 53.08.245, which concerns "economic development programs" being a "public purpose" for funds, the Court of Appeals ignored the word "program," extrapolated, and adopted a rule that would swallow every limitation the legislature has ever placed on port authority because virtually everything can be justified as an "advancement of trade or commerce," or as "stimulating economic development." Slip Op. at 20-22. Surely running an airporter service or selling extra ice (both of which this Court held to be outside the Port's authority) would qualify, and so would buying a taxicab company, acquiring an airline, opening a McDonald's franchise, starting a regional bank, forming an insurance company, subsidizing a shoe shine stand, and creating a tech startup.

According to Division One, if you can name it and it touches the economy, a port could do it. That is not what the legislature intended and is not what this Court has held for the past century. A port has authority to acquire a rail line only if the purchase meets the criteria set forth in one of the statutes specifically dealing with a port's acquisition of rail lines.

B. <u>This Case Involves an Issue of Substantial Public Interest that Should Be Determined by this Court.</u>

Review is also appropriate under RAP 13.4(b)(4) because "the petition involves an issue of substantial public interest that should be determined by the Supreme Court."

The Port spent over $80 million of taxpayer money acquiring the northern portion of the Corridor, primarily to induce BNSF to donate the southern portion of the Corridor for use as a recreational trail. The Port did this because it collects "taxes in King County" and it has "the right to raise the property tax without a vote, up to a pretty high level." CP at 499. Whether the Port's expenditure of such a large amount of taxpayersupplied funds was legally permissible is an issue of substantial public interest. Turning abandoned rail lines into recreational trails is admirable. However, ports are not vested with authority to make counties more livable or to "to raise the property tax without a vote" just because they want to and doing so might assist another governmental entity.

This Court should assume its proper role and pass upon the authority of this "creature of statute." Only this Court can hold the Port of Seattle accountable to the people of Washington, whose legislature endowed port districts only with limited powers.

VI. CONCLUSION

Petitioners ask this Court to accept review and to reverse Division One's unprecedented and unwarranted expansion of a port district's authority far beyond the limits set by the legislature.

Respectfully submitted this 23rd day of December, 2013.

HELSELL FETTERMAN LLP

By____________________

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CERTIFICATE OF SERVICE

I, KYNA GONZALEZ, hereby declare as follows, under penalty of perjury under the laws of the State of Washington:

1. I am over 21 years of age and am competent to testify, and I make the following statements based upon my personal knowledge and belief.

2. On the date listed below, I caused the foregoing Appellants' Petition for Review to be filed with the Court and to be sent to counsel for the parties in the following manner:

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DATED: December 23, 2013

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APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

ARTHUR LANE; JOHN ALLERTON, and KENNETH GOROHOFF, Appellants,	No. 69157-1-I
v.	DIVISION ONE
PORT OF SEATTLE; KING COUNTY; BNSF RAILWAY COMPANY; GNP RLY, INC.; and CITY OF REDMOND, Respondents.	PUBLISHED OPINION FILED: November 25, 2013

BECKER, J. — The Port of Seattle purchased the Eastside Rail Corridor from Burlington Northern Santa Fe Railway Company (BNSF) for $81.4 million and sold portions to fellow respondents King County and the city of Redmond. Appellants contend the Port lacked statutory authority to make the purchase because the northern part of the corridor lies outside the port district and will not be used to run cargo to or from existing port facilities. We conclude the Port acted within its statutory powers.

In 2003, Burlington Northern announced its intention to sell the Eastside Rail Corridor, a 42-mile rail line that runs from Renton to Snohomish and includes a spur line running east to Redmond.

The main north-south line of the corridor was built in the late 1800s as a narrow, single-track line to move freight along the east side of Lake Washington. Then known as the Lake Washington Beltline, it provided freight service for nearly a century. The Redmond Spur, which began operating in the 1880s, was also built to move freight.

The southern portion of the corridor, between Renton and just south of Woodinville, is located entirely within King County, as is the Redmond Spur. The southern portion and the Spur are within the port district, the boundaries of which are coterminous with King County.

The northern portion of the corridor, running from just south of Woodinville to Snohomish, lies mostly in Snohomish County, outside the port district. At the north end, the tracks connect to the interstate rail line along which Burlington Northern transports freight to and from the Midwest over Stevens Pass. GNP Railway Inc. holds the right to transport freight from the interstate line to businesses located along the northern portion of the line between Woodinville and Snohomish. Currently, that freight traffic is intermittent and slow.

Burlington Northern decided to sell the corridor after determining that it was no longer economically viable for freight use due in part to increased maintenance costs and changing land use patterns that have brought about higher property values, causing industrial businesses to move elsewhere.

Burlington Northern offered public entities the first crack at acquiring the Eastside Rail Corridor. In 2005, King County emerged as a potential buyer. The County was interested in preserving the corridor for transportation and trail uses and did not want to see it parceled out in a way that would interfere with those uses. In 2006, the County approached the Port about joining in the purchase.

In 2009, having obtained assurances from various public entities that they would contribute toward the purchase price, the Port entered into a purchase and sale agreement to buy the northern portion and the Redmond Spur from Burlington Northern for $81,449,000. Burlington Northern agreed to donate the southern portion to the Port. Both agreements closed on December 21, 2009, as a single, interdependent transaction with each agreement conditioned on the other. The transaction was also conditioned on federal approval of "railbank" status for the portions of the corridor inside King County. On the same closing date, the County and the Port signed an interlocal agreement whereby Burlington Northern would continue using the northern portion for freight service, and the Port would place the southern portion and the Spur into "railbanked status" under the National Trails System Act, known as the "Rails to Trails Act," 16 U.S.C. §1247(d). Under the act, the railroad right-of-way can be converted to trail use as long as it remains preserved for future rail reactivation. The County agreed to assume responsibility as the interim trail user to develop and maintain the railbanked segments of the corridor.

Since the 2009 purchase, several public entities have paid the Port for parts of the corridor. Of the Port's initial outlay of $81.4 million, the sum of nearly

$58 million has been recouped in this manner as of the date of our appellate record. In June 2010, the city of Redmond paid $10 million to purchase 3.9 miles of the Redmond Spur for regional light rail, utility, and infrastructure improvements. In December 2010, Puget Sound Energy paid $13.8 million for a utility easement along the length of the corridor. In April 2012, Sound Transit paid $13.8 million for a transportation easement in the southern portion and the Spur, plus a fee interest in a one-mile segment in Bellevue for the East Link light rail route. That same month, the Port sold an interest in a short section of the southern portion to the city of Kirkland for $5 million. Finally, King County agreed to pay the Port $15 million to purchase the southern portion for future commuter rail use and to obtain an easement in part of the northern portion. Each of these agreements includes a provision complying with the federal railbanking statute, meaning ownership is subject to future rail use.

Plaintiffs Arthur Lane, John Allerton, and Kenneth Gorohoff filed suit in July 2010 to invalidate the purchase of the northern portion and the Redmond Spur as an unlawful expenditure of taxpayer funds. They named the Port, Burlington Northern, King County, the city of Redmond, and GNP Railway, Inc., as defendants because each entity had acquired an interest in the corridor or could be adversely affected by rescission of the $81.4 million deal. They claim the Port lacked statutory authority to purchase the corridor. However, they seek to unwind only the Port's acquisition of the northern portion and the Spur. According to their complaint, the plaintiffs wish to leave undisturbed the donated southern portion of the corridor that King County plans to develop for trail use.

In a comprehensive and well-reasoned opinion issued on December 9, 2011, the trial court granted the defendants' motions for summary judgment, dismissing the plaintiffs' claims with prejudice. This appeal followed.

As a threshold issue, the Port asserts that the plaintiffs' case is barred because it was brought as a taxpayer challenge to property taxes and the plaintiffs failed to pay their taxes under protest, which is a statutory precondition for such a suit. RCW 84.68.020; Longview Fibre Co. v. Cowlitz County, 114 Wn.2d 691, 695, 790 P.2d 149 (1990). This issue is moot. The plaintiffs dropped their initial requests for property tax refunds and now seek only declaratory relief and rescission of the purchase. The trial court did not err by hearing their challenge.

This court reviews summary judgment de novo. Tracfone Wireless, Inc. v. Dep't of Revenue, 170 Wn.2d, 273, 280-81, 242 P.3d 810 (2010). Summary judgment is appropriate only when there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law. CR 56(c).

As a municipal corporation, a port is limited in its powers to those expressly granted, those necessarily or fairly implied in or incident to the powers expressly granted, and those essential to its declared purposes. Christie v. Port of Olympia, 27 Wn.2d 534, 545-46, 179 P.2d 294 (1947). From the earliest days of port districts in Washington, their statutory powers have included the acquisition of "rail and water transfer and terminal facilities within such districts." LAWS OF 1911, ch. 92, § 1. The Port does not rely on this early statute, as it does not attempt to characterize the corridor as a "transfer and terminal" facility.

Rather, the primary issue as framed by the parties is whether the necessary authority is found in RCW 53.08.290. RCW 53.08.290 codifies two separate statutes, one enacted in 1980 and one in 1981.

The construction of statutes is a question of law reviewed de novo. Whatcom County Fire Dist. No. 21 v. Whatcom County, 171 Wn.2d 421, 433, 256 P.3d 295 (2011). In determining whether a statute conveys a plain meaning, "that meaning is discerned from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question." Dep't of Ecology v. Campbell & Gwinn, LLC, 146 Wn.2d 1, 11, 43 P.3d 4 (2002). "Plain meaning 'is to be discerned from the ordinary meaning of the language at issue, the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole.'" Lake v. Woodcreek Homeowners Ass'n, 169 Wn.2d 516, 526, 243 P.3d 1283 (2010), quoting State v. Engel, 166 Wn.2d 572, 578, 210 P.3d 1007 (2009).

THE 1980 STATUTE: "IN CONNECTION WITH"

The first statute we must consider is Laws of 1980, chapter 110, entitled an act "providing for facilities by port districts for the movement of freight and passengers."

Section 2 of the 1980 act expressly authorizes a port district to acquire rail services:

> 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:* PROVIDED, That no port district shall engage in the manufacture of rail cars for use off port property.

LAWS OF 1980, ch. 110, § 2 (emphasis added).

As the plaintiffs interpret section 2 of the 1980 statute, the authority it grants ports to acquire rail services is limited by the phrase, "in connection with the operation of facilities and improvements of the district," found in the first sentence. According to the plaintiffs, the phrase means that a port may acquire a rail corridor only for the purpose of moving cargo to and from its existing facilities, such as the facilities maintained by the Port at Elliott Bay and Sea-Tac Airport. Because the Eastside Rail Corridor has no physical connection to the harbor and the airport, the plaintiffs contend the Port's purchase of the corridor was unauthorized.

The plain language of the statute does not support their position. Section 2 consists of two sentences. Each addresses a distinct topic. The first is the extent of a port district's authority to "perform all necessary activities related to the intermodal[1] movement of interstate and foreign cargo." The second is the extent of a port district's authority to "acquire, construct, purchase, lease, contract for, provide, and operate rail services, equipment, and facilities."

[1] Intermodal means "involving transportation by more than one form of carrier during a single journey." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 99a (2002).

Section 1 of the 1980 statute states that the purpose of the statute was to clarify existing law. LAWS OF 1980, ch. 110, § 1(1). In accord with that expressed intent, it is most natural to read section 2 as the legislature's confirmation that the general powers of port districts at the time of the enactment already specifically included performing activities related to intermodal cargo movement and acquiring rail services.[2] The provisos that follow each of the two sentences qualify these powers by telling port districts two specific things they may *not* do. Ports may not transport cargo outside the district by motor vehicle for compensation, and they may not manufacture rail cars for use off of port property.[3]

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[2] See, e.g., RCW 53.08.020, authorizing ports to construct, purchase, and operate belt line railways. LAWS OF 1961, ch. 126, § 1. Because we find the requisite authority to purchase the corridor in RCW 53.08.290 (the focal point of the parties' dispute), we do not address the Port's argument that the corridor also qualifies as a belt line railway under RCW 53.08.020.

[3] Legislative history may be of some interest even where the court concludes that the plain language of the statute is unambiguous. Scott v. Cascade Structures, 100 Wn.2d 537, 544, 673 P.2d 179 (1983). This is particularly so where the contemporaneous record of a bill's progress bolsters the plain meaning. In that vein, we set forth what the Senate and House journals disclose about the bill that eventually became Laws of 1980, chapter 110. We recognize that remarks of individual legislators in floor debate cannot be used to establish the intent of the entire legislative body. Scott, 100 Wn.2d at 544. We also recognize that legislative history may not be relied upon as an aid in discerning legislative intent unless the statute under review is susceptible to more than one reasonable meaning. Campbell & Gwinn, LLC, 146 Wn.2d at 12. We do not rely on the legislative history but simply note the plain meaning of the statute is consistent with the legislative history.

The bill began as Senate Bill 3422. The proviso forbidding the manufacture of rail cars for use off of port property was added to the bill by a Senate floor amendment. SENATE JOURNAL, 46th Leg., Reg. Sess., at 358-59 (Wash. 1980). In the course of the floor debate, the Senate rejected proposed language that would have prohibited a port from purchasing "any railroad tracks located on property not owned by the port district." SENATE JOURNAL, 46th Leg., Reg. Sess., at 358-59 (Wash. 1980). The bill passed the Senate and went to the House. The House committee reported the bill out with a recommendation to amend it by adding the proviso forbidding "transportation of

The second sentence states that, so long as a port district does not engage in the manufacturing of rail cars for use off port property, it may acquire a rail line. This plain statement would appear to support the Port's purchase of the Eastside Rail Corridor without the need for further inquiry into the meaning of the statute.

The plaintiffs, however, contend that the authority for the acquisition of rail found in the second sentence is subject to a limitation found in the first sentence. They propose to read section 2 as if the two distinct sentences were really one: "a port district, in connection with the operation of facilities and improvements of the district, may . . . acquire, construct, purchase, lease, contract for, provide, and operate rail services, equipment, and facilities." Ignoring the intervening language and proviso, they then contend that the phrase "in connection with" means that the second sentence authorizes the acquisition of a rail line only if the line links up to (is "in connection with") the harbor or the airport ("the operation of facilities and improvements of the district").

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commodities by motor vehicle for compensation outside the boundaries of the port district." HOUSE JOURNAL, 46th Leg., Reg. Sess., at 345 (Wash. 1980). On the floor, the amendment was adopted, and the House passed the bill as amended. HOUSE JOURNAL, 46th Leg., Reg. Sess., at 441 (Wash. 1980). The Senate later concurred in the House amendment. The sponsor of the Senate bill remarked, "'They have simply added the word 'trucking' [an apparent reference to the House amendment] to the other things that they did not want the port district to get into; . . . and for the record, there is no intent in this bill that any port district shall enter into competition with any private firm that is in operation.'" SENATE JOURNAL, 46th Leg., Reg. Sess., at 632 (Wash. 1980). The Senate concurred in the House amendment and passed Engrossed Senate Bill 3422, which was eventually signed into law.

This is a strained way to read section 2 of the 1980 statute. The plaintiffs contend their reading is mandatory because the statement of legislative purpose in section 1 shows that the two topics are interrelated. But the relationship between the two topics as declared by section 1 is merely that both topics are about the movement of cargo:

> NEW SECTION. Section 1. The purpose of this act is to:
> (1) Clarify 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). The "in connection with" language is not found in the statement of legislative intent. That language modifies only the first sentence of section 2 concerning the performance of "all necessary activities related to the intermodal movement of interstate and foreign cargo." It does not modify the second sentence concerning the power to acquire "rail services, equipment, and facilities."

We conclude that the 1980 statute conveys a plain meaning. It authorizes a port district to acquire a rail line for the movement of cargo. The 1980 act contains no requirement that the rail line acquired must have a physical connection with already existing port facilities.

THE 1981 STATUTE: "EXTRATERRITORIAL RAIL SERVICES"

Statutory authority has long existed allowing a port to acquire by purchase or by condemnation "all lands, property, property rights, leases, or easements necessary for its purposes." RCW 53.08.010. Ports may construct, purchase, and operate many different types of facilities, including harbor improvements, warehouses, bridges, subways, rail terminal facilities, and "belt line railways." RCW 53.08.020. But generally, a port district must exercise its powers "within the district." RCW 53.04.010; State ex rel. Keeler v. Port of Peninsula, 89 Wn.2d 764, 767-68, 575 P.2d 713 (1978).

As discussed above, section 2 of the 1980 statute authorized ports to acquire rail, but it did not specify whether or not it was permissible to acquire rail outside of port boundaries.

In 1981, the legislature amended the 1980 statute. The 1981 statute explicitly gave ports the authority to acquire rail facilities "outside the port district." But an added proviso stated that the authority could be exercised outside the port district boundaries only if the port commission adopted a resolution finding the "extraterritorial rail services, equipment or facilities" to be "reasonably necessary" to link up to an interstate railroad system:

> 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.

LAWS OF 1981, ch. 47, § 1 (underlined portion is language added in 1981); RCW 53.08.290.[4]

The port commission voted to move forward with the purchase of the Eastside Rail Corridor in May 2008. The purchase closed in December 2009. The plaintiffs brought suit in July 2010, alleging that the port commission had failed to comply with the statutory requirement for a formal resolution. On August 3, 2010, the port commission passed resolution 3639 to ratify its prior acts and to cure what the Port refers to as "a procedural oversight." Resolution 3639 stated that the Port's acquisition of the Snohomish County portion of the corridor was "reasonably necessary to link the rail services, equipment, and facilities within the port district to an interstate railroad system."

The plaintiffs contend the Port's acquisition is *ultra vires* because the port commission adopted the resolution of reasonable necessity after the purchase closed, not before. They analogize to Noel v. Cole, 98 Wn.2d 375, 655 P.2d 245 (1982). In Noel, the Department of Natural Resources sold timber rights to a private company without first preparing an environmental impact statement as

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[4] The Port cites a 1981 "Final Legislative Report," which provides the following "BACKGROUND" for Laws of 1981, chapter 47:

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

A "Final Legislative Report," typically a compendium prepared by staff at the end of a session, is not a particularly authoritative document for purposes of discerning legislative intent, and we do not rely on it for that purpose, but merely note its consistency with our determination of the plain meaning of the 1980 statute.

required by the State Environmental Policy Act of 1971 (SEPA). Because the violation thwarted one of the central purposes of SEPA—to insure that environmental impacts are considered before a decision is made—the court declared the sale ultra vires and void. Noel, 98 Wn.2d at 380. The plaintiffs argue that similarly here, the port commission's failure to make a formal finding of necessity until after the decision to purchase the corridor "strikes at the heart of the policy behind the statute—that a port carefully consider its need for rail in a public hearing before the acquisition."

The law recognizes a distinction between government acts that are "ultra vires" and acts that suffer from "some procedural irregularity." S. Tacoma Way, LLC v. State, 169 Wn.2d 118, 122, 233 P.3d 871 (2010). "Ultra vires acts are those performed with no legal authority and are characterized as void on the basis that no power to act existed, even where proper procedural requirements are followed." S. Tacoma Way, 169 Wn.2d at 123. In S. Tacoma Way, the Department of Transportation sold some surplus property to an abutting landowner. By mistake, the Department failed to comply with a regulation requiring that a notice of intent to sell be given to all abutting landowners. One of the other abutting landowners sued to have the sale declared void. The court held that because the State was "generally authorized" to sell surplus property, the sale was not ultra vires. S. Tacoma Way, 169 Wn.2d at 123. The underlying purpose of the regulation requiring notice to other property owners was "to protect the public from governmental fraud or collusion." S. Tacoma Way, 169 Wn.2d at 124. There was no argument that fraud or collusion had occurred.

Thus, the violation of statutory procedures did not render the contract "automatically" illegal and unenforceable. S. Tacoma Way, 169 Wn.2d at 124.

The Court distinguished and limited the holding in Noel:

> In Noel, we emphasized the policy underlying SEPA: "'presently unquantified environmental amenities and values will be given appropriate consideration in decision making'." Noel, 98 Wn.2d at 380 (quoting RCW 43.21C.030(2)(b)). The State, in making its sale, not only failed to comply with SEPA's requirement for an EIS, it also failed to act in accordance with the policy underlying SEPA. . . . The State's failure to comply with SEPA in Noel is thus not analogous to the State's procedural error before us here.

S. Tacoma Way, 169 Wn.2d at 126.

The issue presented here calls for application of the distinction made by S. Tacoma Way. The Port was "generally authorized" to act on real estate purchases (see, e.g., RCW 53.08.010), and it also had specific authority to acquire a rail line under RCW 53.08.290. 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. The Port acted in accordance with that policy. The purchase was addressed numerous times in public meetings of the port commission before the deal was finalized in December 2009. For example, in November 2007, commissioners insisted that a memorandum of understanding with King County and Burlington Northern about the future purchase include the following clauses:

> (A) A critical element to the competitiveness of the Port and King County, Washington in general, as well as the region, is the velocity and capacity of facilities and infrastructure for the transfer of

> international cargo from ships to freight trains and its movement to the ultimate customer;
> (B) The Port desires to acquire and preserve the Woodinville Subdivision as a rail and transportation corridor.

At a December 2007 meeting in which commissioners authorized continuing negotiations with Burlington Northern, the justification for the purchase was described as preserving "a rail and transportation corridor; consistent with federal rail-banking requirements." In meetings about the purchase in 2008, commissioners returned repeatedly to the goal of preserving the rail corridor for freight and transportation uses. We conclude that the port commission fulfilled the statutory purpose of carefully considering whether the purchase was reasonably necessary to link rail services within the port district to the interstate line. Therefore, the commission's failure to adopt a formal resolution until after the transaction closed did not render the purchase ultra vires.

The plaintiffs also attack, head-on, the commission's finding of reasonable necessity in resolution 3639. They contend there is no necessity, but only a theoretical possibility, that the Port will ever use the Snohomish County segment of the corridor to move cargo from rail facilities in King County up to the interstate line across Stevens Pass.

The resolution of reasonable necessity was quasi-legislative in nature and therefore is subject to review on the merits only to determine if it is "arbitrary, capricious, or contrary to law." Dorsten v. Port of Skagit County, 32 Wn. App. 785, 788-89, 650 P.2d 220, review denied, 98 Wn.2d 1008 (1982). Such a determination generally is "'conclusive in the absence of proof of actual fraud or arbitrary and capricious conduct, as would constitute constructive fraud.'" Pub. Util. Dist. No. 2 of Grant County v. N. Am. Free Trade Zone Indus., LLC, 159 Wn.2d 555, 575-76, 151 P.3d 176 (2007), quoting HTK Mgmt., LLC v. Seattle Popular Monorail Auth., 155 Wn.2d 612, 629, 121 P.3d 1166 (2005). Arbitrary and capricious refers to "willful and unreasoning action, taken without regard to or consideration of the facts and circumstances surrounding the action. Where there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous." Abbenhaus v. City of Yakima, 89 Wn.2d 855, 858-59, 576 P.2d 888 (1978); see Petition of Port of Grays Harbor, 30 Wn. App. 855, 863, 638 P.2d 633 (a port's long range plan for developing property is not arbitrary and capricious simply because a reviewing court would select a different option), review denied, 97 Wn.2d 1010 (1982).

Given the highly deferential standard of review, the plaintiffs' challenge to the resolution on reasonable necessity must fail. The Port concluded that if it did not step up to acquire the Eastside Rail Corridor, Burlington Northern would have parceled it out to various owners, eliminating the possibility of preserving the corridor for future rail service and transportation needs and thereby depriving the Puget Sound economy of a competitive advantage. The legislature has recognized that rail line abandonment threatens the economic vitality of the state:

> Since 1970, Washington has lost over one-third of its rail miles to abandonment and bankruptcies. The combination of rail abandonments and rail system capacity constraints may alter the delivery to market of many commodities. In addition, the resultant motor vehicle traffic increases the burden on state highways and

> county roads. In many cases, the cost of maintaining and upgrading the state highways and county roads exceeds the cost of maintaining rail freight service. Thus, the economy of the state will be best served by a policy of maintaining and encouraging a healthy rail freight system by creating mechanisms that keep rail freight lines operating if the benefits of the service outweigh the cost.

RCW 47.76.200. "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. "Local jurisdictions may implement rail service preservation projects in the absence of state participation." RCW 47.76.240(4).

Plaintiffs point to a May 2007 study in which the Puget Sound Regional Council concluded the Eastside Rail Corridor was not "a strategic regional or state freight corridor." But as the trial court noted, the undisputed evidence is that the port commissioners did not agree with the conclusions reached by the Puget Sound Regional Council. They preferred to take a longer term view of the region's transportation needs. The existence of a competing opinion about whether preserving the rail corridor will ultimately benefit the economy does not mean the Port's judgment is arbitrary and capricious.

The Port believes the northern portion of the corridor will continue to be used to deliver cargo from Burlington Northern's interstate line to businesses within King County. GNP Railway, although currently in bankruptcy proceedings, has continued such service to some north King County companies. Even if the plaintiffs are correct that this traffic is presently decreasing, it is not arbitrary for the Port to adopt the view that it is best to keep options open for the long term.

Among the rationales articulated by the Port is that in the event of a natural disaster that disables Burlington Northern's main line running along the west side of Seattle, the Eastside Rail Corridor will be available as a backup to move freight. The plaintiffs challenge this rationale as factually unfounded because the Regional Council's study said the corridor is incapable of transporting freight at high levels. That may be true at the present time, but part of the Port's job is to consider how to facilitate the movement of cargo in the face of earthquakes, floods, and volcano eruptions. As the trial court observed, the Port's argument that the northern portion could be used to bring supplies from the Midwest into King County in the event of a natural disaster is, by itself, sufficient to pass the "arbitrary and capricious" test. "A 'stitch in time' has never been considered capricious." City of Tacoma v. Welcker, 65 Wn.2d 677, 685-86, 399 P.2d 330 (1965) (city's decision to acquire land next to river to protect against possible contamination of water supply was not arbitrary and capricious even though no present threat existed). It is not for this court to weigh the wisdom of the Port's "stitch in time" rationale for the purchase. The ballot box is the appropriate mechanism for deciding whether the Port has exercised poor judgment by spending taxpayer dollars to preserve a rail connection through Snohomish County rather than to undertake projects more traditional and immediate.

The plaintiffs believe the true motive for the purchase was to facilitate recreational trails, not the movement of cargo. Citing various comments by the port commissioners, the plaintiffs contend that the economic and emergency rationales for labeling the purchase "necessary" were identified only after the filing of the lawsuit forced the adoption of resolution 3639, and that in adopting that resolution, the commission was merely giving lip service to the statutory requirement of reasonable necessity. "The Port acquired the Corridor because it had access to taxpayer money that it chose to use to help cash-strapped King County construct its 'granddaddy of all trails.' Saying otherwise, just to win a lawsuit, amounts to constructive fraud."[5]

This again is a political argument, not a legal one. The record does not contain evidence of actual or constructive fraud. The deliberations and comments of the port commissioners were open and aboveboard. Whatever other beneficial attributes the port commissioners may have seen in the purchase, it is not dishonest to say that the extraterritorial portion of the corridor is "reasonably necessary" to link the eastside rail lines within King County to the interstate track across Stevens Pass. "Necessary" in the context of a port district's purchase of land under RCW 53.08.010 "'does not mean absolute, or indispensable, or immediate need, but rather its meaning is interwoven with the concept of public use . . . and embraces the right of the public to expect and demand the service and facilities to be provided by a proposed acquisition or improvement.'" Asotin County Port Dist. v. Clarkston Cmty. Corp., 73 Wn.2d 72, 75, 436 P.2d 470 (1968), quoting Welcker, 65 Wn.2d at 684. We conclude "necessary" has the same meaning in RCW 53.08.290. As the trial court noted,

[5] Appellant's Brief at 48.

there is "no dispute" that the only way to connect the in-district rail lines to Burlington Northern's interstate railroad system is via the northern segment of the corridor lying within Snohomish County. The Port's resolution on reasonable necessity is not subject to judicial second-guessing. It must be treated as a conclusive determination of reasonable necessity.

RCW 53.08.010
ACQUISITION OF PROPERTY "NECESSARY FOR ITS PURPOSES"

We must look to a different statute to find authority for the acquisition of the Redmond Spur, which lies entirely within the port district. As the trial court concluded, the spur portion of the purchase cannot be justified under RCW 53.08.290 because, given the current and planned uses for the Spur, it is undisputed that the purchase is unrelated to the movement of cargo. The trial court ruled, "It is clear that the Port purchased the Redmond Spur with the intent to sell a portion of it to the City of Redmond for its economic and infrastructure development and to sell a portion to Sound Transit for use as a part of a commuter rail system."

The trial court found the purchase was justified under RCW 53.08.010. This statute authorizes 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. State ex. rel. Gorton v. Port of Walla Walla, 81 Wn.2d 872, 877, 505 P.2d 796 (1973). One of the statutorily approved purposes of port districts is economic development. "It shall be in the public purpose for all port districts to engage in economic development programs." RCW 53.08.245(1).

Plaintiffs contend that the phrase "necessary for its purposes" in RCW 53.08.010 is not specific enough to authorize the purchase of a rail line. They point out that RCW 53.08.010 was on the books in 1917 when the Supreme Court held that the Seattle port commissioners lacked power to build and operate a railway as a common carrier. See State ex rel. Huggins v. Bridges, 97 Wash. 553, 166 P. 780 (1917). After Huggins, the legislature adopted statutes authorizing ports to become involved with rail under specified circumstances, such as RCW 53.08.290 (discussed above) and RCW 53.08.020 (authorizing the purchase and operation of belt line railways). Plaintiffs argue that because there is no statute specifically allowing acquisition of a rail line to serve the purpose of economic development, the purchase of the Redmond Spur must be held invalid.

Huggins does not bear the weight appellants would place on it. Huggins was decided shortly after the legislature first authorized the establishment of port districts in 1911. The initial enabling statute authorized the development of "a system of harbor improvements and rail and water transfer and terminal facilities within such districts." LAWS OF 1911, ch. 92, § 1. The Seattle port district had resolved to "run an independent switching belt railway line of its own" as a common carrier and fund it with various nonbond revenues, a proposal that engendered controversy in part because the Port had twice tried and failed to get voter approval to bond the project. Huggins, 97 Wash. at 554-56. The Supreme Court determined that the statute did not authorize the Port to acquire a rail line and operate as a common carrier. The reference to "rail and water transfer and terminal facilities" signified "the idea of transshipment from rail carrier to water carrier and vice versa." Huggins, 97 Wash. at 558. That might include, for example, "a connecting track between two docks or piers or warehouses of the port commission," Huggins, 97 Wash. at 559, but it most certainly did not include a track outside the terminal to serve the public generally as a common carrier.

In the years since Huggins, the statutory powers of port districts have grown. Notably, port districts now are permitted to acquire land for the purpose of promoting economic development under RCW 53.08.245. Because economic development is a recognized purpose, the trial court correctly ruled that acquisition of the Redmond Spur for economic development is justified under RCW 53.08.010.

Plaintiffs argue that a port's involvement with economic development is limited to programs for job training and placement under RCW 53.08.245(2)(a). This argument has no merit. The section plaintiffs cite was enacted in 2010, after the purchase of the Eastside Rail Corridor, as an amendment to RCW 53.08.245. And the supposed limiting language is simply permissive; it states that economic development programs "may include" job training and placement. The intent of the statute is not to limit a port's activities to job training and placement but rather to resolve any doubt that the term "economic development" is broad enough to include job training and placement.

The plaintiffs scoff at the idea that purchase of the Redmond Spur will promote economic development. They argue that the only way it can stimulate

commerce and create jobs is if "bicyclists riding on the Spur trail would stop to buy ice cream, bottled water, or a new inner tube to repair a flat."[6] But actually, the record contains impressive documentation of what preservation of the Spur will mean to the city of Redmond, the center of a rapidly growing and urbanizing area. Redmond already has invested heavily in plans to redevelop the Spur to add pedestrian, transit, and business connections, and to unite the two parts of the city that presently are severed by the tracks. Planned uses of the spur corridor include new and better connected infrastructure for transportation and utilities. For example, Redmond anticipates building a stormwater trunk line within the spur right-of-way to enable property owners in the downtown core to use all of their land for commercial and residential development instead of having to reserve large portions of it for stormwater detention. And Redmond's planning also demonstrates that bicycle trails add economic value as well as recreational value.

We agree with the trial court's conclusion about the Redmond Spur: "Given the record before the Court, it was reasonable for the port commissioners to conclude that purchasing the Redmond Spur would advance trade and commerce, promote industrial growth and stimulate economic development, and was thus 'necessary for its purposes' under RCW 53.08.010."

[6] Appellant's Brief at 28.

In summary, the Port acted within the authority provided by statute when it acquired the Eastside Rail Corridor. The trial court properly dismissed the claims of the plaintiffs on summary judgment.

Affirmed.

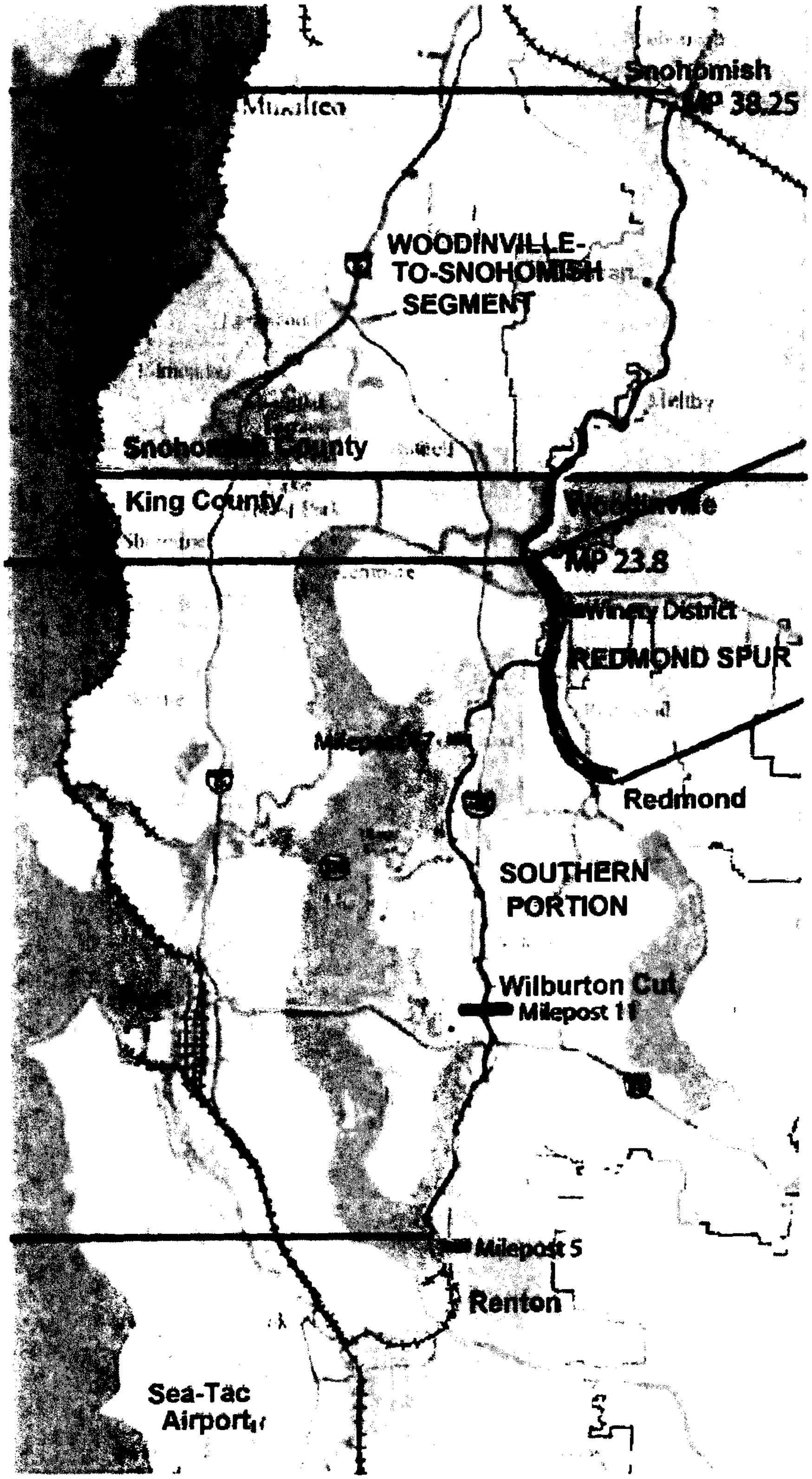
Becker, J.

WE CONCUR:

Verellen, J.

Dwyer, J.

APPENDIX B



Adapted from CP 583 (Dep. Ex. 1)

APPENDIX C

Any person or persons, firm or corporation, or the agent of any person or persons, firm or corporation, who denies or interferes with admittance to or enjoyment of the public facilities enumerated in RCW 70.84.010, or otherwise interferes with the rights of a totally or partially blind or hearing impaired person as set forth in RCW 70.84.010 shall be guilty of a misdemeanor.

Sec. 8. Section 9, chapter 141, Laws of 1969 and RCW 70.84.080 are each amended to read as follows:

In accordance with the policy set forth in RCW 70.84.010, the blind, the visually handicapped, the hearing impaired, and the otherwise physically disabled shall be employed in the state service, in the service of the political subdivisions of the state, in the public schools, and in all other employment supported in whole or in part by public funds on the same terms and conditions as the able-bodied, unless it is shown that the particular disability prevents the performance of the work involved.

Passed the Senate February 26, 1980.
Passed the House February 19, 1980.
Approved by the Governor March 10, 1980.
Filed in Office of Secretary of State March 10, 1980.

CHAPTER 110

[Engrossed Senate Bill No. 3422]
PORT DISTRICTS——INTERMODAL CARGO MOVEMENT, WATERCRAFT OPERATING AUTHORITY

AN ACT Relating to port districts; providing for facilities by port districts for the movement of freight and passengers; adding new sections to chapter 53.08 RCW; and creating a new section.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Section 1. The purpose of this act is to:

(1) Clarify 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; and

(2) Provide authority for port districts to assist in development of the recreation-tourism industry by acquiring and operating certain watercraft in limited areas.

NEW SECTION. Sec. 2. There is added to chapter 53.08 RCW a new section to read as follows:

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: PROVIDED, That no port district shall engage in the manufacture of rail cars for use off port property.

NEW SECTION. Sec. 3. There is added to chapter 53.08 RCW a new section to read as follows:

A port district may acquire, lease, construct, purchase, maintain, and operate passenger carrying vessels on interstate navigable rivers of the state and intrastate waters of adjoining states. Service provided shall be under terms, conditions, and rates to be fixed and approved by the port commission. Operation of such vessels shall be subject to applicable state and federal laws pertaining to such service.

Passed the Senate February 22, 1980.
Passed the House February 18, 1980.
Approved by the Governor March 10, 1980.
Filed in Office of Secretary of State March 10, 1980.

CHAPTER 111

[Senate Bill No. 3474]

LANDOWNERS' LIABILITY——INJURIES TO FIREWOOD CUTTERS

AN ACT Relating to natural resources; and amending section 2, chapter 216, Laws of 1967 as last amended by section 1, chapter 53, Laws of 1979 and RCW 4.24.210.

Be it enacted by the Legislature of the State of Washington:

Section 1. Section 2, chapter 216, Laws of 1967 as last amended by section 1, chapter 53, Laws of 1979 and RCW 4.24.210 are each amended to read as follows:

Any public or private landowners or others in lawful possession and control of any lands whether rural or urban, or water areas or channels and lands adjacent to such areas or channels, who allow members of the public to use them for the purposes of outdoor recreation, which term includes, but is not limited to, the cutting, gathering, and removing of firewood by private persons for their personal use without purchasing the firewood from the landowner, hunting, fishing, camping, picnicking, swimming, hiking, bicycling, the riding of horses or other animals, clam digging, pleasure driving of off-road vehicles, snowmobiles, and other vehicles, boating, nature study, winter or water sports, viewing or enjoying historical, archaeological, scenic, or scientific sites, without charging a fee of any kind therefor, shall not be liable for unintentional injuries to such users: PROVIDED, That any public or private landowner, or others in lawful possession and control of the land,

APPENDIX D

or a subcontractor to submit to such officer a "Statement of Intent to Pay Prevailing Wages". For a contract in excess of ten thousand dollars, the statement of intent to pay prevailing wages shall include:

(1) The contractor's registration certificate number; and

(2) The prevailing rate of wage for each classification of workers entitled to prevailing wages under RCW 39.12.020 and the number of workers in each classification.

Each statement of intent to pay prevailing wages must be approved by the industrial statistician of the department of labor and industries before it is submitted to said officer. Unless otherwise authorized by the department of labor and industries, each voucher claim submitted by a contractor for payment on a project estimate shall state that the prevailing wages have been paid in accordance with the prefiled statement or statements of intent to pay prevailing wages on file with the public agency. Following the final acceptance of a public works project, it shall be the duty of the officer charged with the disbursement of public funds, to require the contractor and each and every subcontractor from the contractor or a subcontractor to submit to such officer an "Affidavit of Wages Paid" before the funds retained according to the provisions of RCW 60.28.010 are released to the contractor. Each affidavit of wages paid must be certified by the industrial statistician of the department of labor and industries before it is submitted to said officer.

Passed the House March 30, 1981.
Passed the Senate April 13, 1981.
Approved by the Governor April 22, 1981.
Filed in Office of Secretary of State April 22, 1981.

CHAPTER 47

[House Bill No. 551]

PORT DISTRICTS——EXTRATERRITORIAL RAIL SERVICE

AN ACT Relating to port districts; amending section 2, chapter 110, Laws of 1980 and RCW 53.08.290; and declaring an emergency.

Be it enacted by the Legislature of the State of Washington:

Section 1. Section 2, chapter 110, Laws of 1980 and RCW 53.08.290 are each amended to read as follows:

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.

NEW SECTION. Sec. 2. This act is necessary for the immediate preservation of the public peace, health, and safety, the support of the state government and its existing public institutions, and shall take effect immediately.

Passed the House March 17, 1981.
Passed the Senate April 11, 1981.
Approved by the Governor April 22, 1981.
Filed in Office of Secretary of State April 22, 1981.

CHAPTER 48

[House Bill No. 42]

DRUG PARAPHERNALIA——PROHIBITED ACTS, PENALTIES

AN ACT Relating to drug-related paraphernalia; amending section 69.50.505, chapter 308, Laws of 1971 ex. sess. as amended by section 1, chapter 77, Laws of 1977 ex. sess. and RCW 69.50.505; adding new sections to chapter 308, Laws of 1971 ex. sess. and to chapter 69.50 RCW; and prescribing penalties.

Be it enacted by the Legislature of the State of Washington:

NEW SECTION. Section 1. There is added to chapter 308, Laws of 1971 ex. sess. and to chapter 69.50 RCW a new section to be designated as RCW 69.50.102 to read as follows:

DEFINITIONS. (a) As used in this chapter, "drug paraphernalia" means all equipment, products, and materials of any kind which are used, intended for use, or designed for use in planting, propagating, cultivating, growing, harvesting, manufacturing, compounding, converting, producing, processing, preparing, testing, analyzing, packaging, repackaging, storing, containing, concealing, injecting, ingesting, inhaling, or otherwise introducing into the human body a controlled substance. It includes, but is not limited to:

APPENDIX E

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FORTY-SEVENTH LEGISLATURE
1981
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SPECIAL ADVISOR TO LEADERSHIP

House of Representatives
STATE OF WASHINGTON
OLYMPIA

March 26, 1981

M E M O R A N D U M

TO: Senator Hal Zimmerman, Chairman, Local Government Committee

FROM: Repsentative S.E. "Sid" Flanagan

Dear Hal:

I introduced House Bill 551 as a blue sheet bill. This bill is in your Committee and gives port districts the authority to acquire a railway that is partially within a port district's boundaries and partly outside of the district, if the railway connects with a nation-wide rail system.

The purpose of the bill is to give the Beverly-Royal Port District the opportunity to acquire a part of the bankrupt Milwaukee Railroad which will connect with the Burlington Northern System, which previously acquired the part of the Milwaukee running from Othello to Moses Lake.

Whether the shippers in the area can ever generate the financing to back revenue bonds for this acquisition is doubtful, but at least this gives them the opportunity to do it and would restore rail service to this highly productive area.

I will appreciate your taking action on the bill.

Sid

CP 4440