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No. ~~82887-2~~

WASHINGTON STATE SUPREME COURT

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EVERGREEN TRAILS, INC., d/b/a GRAY LINE OF SEATTLE,

Appellant,

v.

KING COUNTY,

Respondent.

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APPELLANT'S OPENING BRIEF

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## I. INTRODUCTION

This case impacts the most important of rights created by both the United States and Washington constitutions. The U.S. Constitution provides that “private property [shall not] be taken for public use, without just compensation.”<sup>1</sup> The Washington Constitution goes even further: “No private property shall be taken or damaged for public or private use without just compensation . . . .”<sup>2</sup> Plaintiff-appellant, Evergreen Trails, Inc., has long owned intangible private property in the form of a certificate of public convenience and necessity (“CPCN”)<sup>3</sup> granted by the Washington Utilities and Transportation Commission (the “WUTC”) that gives it exclusive rights to provide “Airporter”<sup>4</sup> transportation between the Sea-Tac Airport and downtown Seattle. To fulfill these constitutional mandates, the legislature passed a law directly specifically to defendant

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<sup>1</sup> U.S. Const. amend. V.

<sup>2</sup> Wash. Const. art. I, § 16 (emphasis added).

<sup>3</sup> As discussed in Section V(A), *infra*, the law in Washington, as in most other states, is that a CPCN constitutes private property.

<sup>4</sup> As used herein, “Airporter” service describes a direct or expedited scheduled bus service for airline passengers between the Sea-Tac Airport and a destination—in this case, downtown Seattle. It is distinguished from ordinary municipal bus service by the relative lack of intermediate stops. *See generally* CP 258-60, 1271-77.

King County Metro,<sup>5</sup> in anticipation of the very facts of this case. RCW 35.58.240 requires “metropolitan municipal corporations”<sup>6</sup> that extend their “transportation function” to compete with an existing holder of a CPCN must “by purchase or condemnation acquire [the CPCN] at fair market value.” Despite two clear constitutional prohibitions and the related statutory directive<sup>7</sup> Metro has both taken and damaged Evergreen’s CPCN—a judicially recognized substantial and valuable intangible property—all without a dime of compensation.

As RCW 35.58.240 has never been interpreted by any appellate court, the trial court had little to guide it in interpreting the statute and ultimately accepted Metro’s argument that—by taking only small portions of Evergreen’s property each year—no taking had occurred. Thus, the

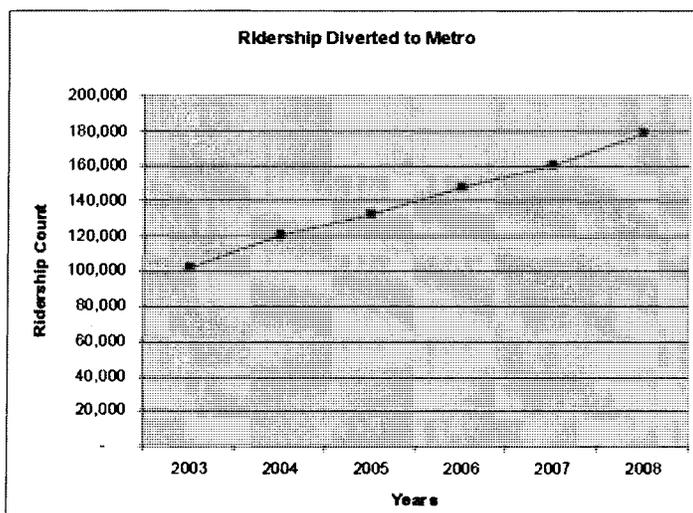
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<sup>5</sup> Metro Municipality of Seattle (Metro) is a part of King County, which assumed all the rights and obligations of Metro under RCW 36.56.010 and King County Charter § 350.20.30. CP 1626-28. Metro now performs the functions of metropolitan public transportation under RCW 35.58.240 and 35.58.245. Therefore, King County, as the operator of Metro, now engages in metropolitan public transportation. Accordingly, “King County” and “Metro” are used interchangeably in this brief.

<sup>6</sup> *See Id.*

<sup>7</sup> RCW 35.58.240.

superior court failed to see the taking for what it was: real, substantial, and ever-increasing, as this undisputed graph shows:<sup>8</sup>



Each additional airline passenger whom Metro diverted from Evergreen constitutes a slight but increasingly greater diminution of Evergreen's CPCN. Collectively, the taking has been substantial. Over the period covered by Evergreen's suit, the taking has nearly *doubled* to 180,000 passengers annually.<sup>9</sup>

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<sup>8</sup> See CP 183.

<sup>9</sup> Although damages are not at issue here, Evergreen's loss in fair market value due to the Metro's unlawful operation of Route 194 is estimated to be as high as \$14.8 million. CP 74; see also CP 1242 (\$13 million of lost revenue in the last three years).

Given the undisputed near-doubling in Metro's diversion of the airline passengers expressly covered by Evergreen's CPCN from 2003-2008, the superior court's holding that Metro had not "extended" its service to Evergreen's exclusive service or area is inexplicable and erroneous. This Court should accept direct review and reverse the dismissals, to affirm the principle that the government cannot take by accretion what it could not take directly, thereby providing much-needed guidance to state and local governments to ensure that intangible property rights are fully protected.

## **II. ASSIGNMENTS OF ERROR**

A. The superior court erred in granting King County's cross-motion for partial summary judgment on February 3, 2009, which found that King County did not violate RCW 35.58.240 because the County purportedly did not "extend" its transportation function into a service or area protected by Evergreen's CPCN.

B. The superior court erred in granting King County's summary judgment motion on February 27, 2009, dismissing Evergreen's claim for an uncompensated and unconstitutional taking under both the federal and Washington State constitutions and 42 U.S.C. § 1983 because

the County purportedly did not take or damage a valuable property right held by Evergreen.

### **III. ISSUES PRESENTED FOR REVIEW**

The issues presented for review pertaining to the assignments of error are as follows:

A. Under the federal and Washington State constitutions and 42 U.S.C. § 1983, may a county transit agency partially take and damage a privately owned CPCN by replicating the owner's service, in the same area, without first paying compensation to the owner of the CPCN for the taking and damage?

B. Under RCW 35.58.240, may a county that is the successor to a metropolitan municipal corporation replicate the transportation service of a privately owned bus service provided under an existing CPCN, in the same area, without first acquiring or condemning at fair market value the CPCN that gives its holder an exclusive right to provide such services?

### **IV. STATEMENT OF CASE**

In 1966, the WUTC issued CPCN No. 849 to Western Tours, Inc., giving Western the exclusive right to provide Airporter service to airline

passengers and their luggage between Sea-Tac and downtown Seattle.<sup>10</sup> In 1985, Evergreen purchased that CPCN and the bus operations from Western.<sup>11</sup> The WUTC approved that purchase and reissued the authority to Evergreen under CPCN No. 819.<sup>12</sup> Although the CPCN number changed, the authority was not new. Rather, the WUTC transferred all rights that Western had in the CPCN to Evergreen.<sup>13</sup> Evergreen's exclusive right to provide this service in the area continues today under CPCN No. 819, with only minor modifications not material to the case, and has never been challenged by the County.<sup>14</sup>

The first time Metro ever operated a bus with service to anywhere was on January 1, 1973, long after Evergreen's predecessor in interest acquired the exclusive right to provide Airporter service to Seattle.<sup>15</sup> Pursuant to RCW 35.58.240, Metro had purchased the bus equipment and

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<sup>10</sup> CP 346, 691-93.

<sup>11</sup> *E.g.*, CP 1577-78.

<sup>12</sup> *E.g.*, CP 348, 1582-84.

<sup>13</sup> *E.g.*, CP 263-64.

<sup>14</sup> *See* CP 1240.

<sup>15</sup> CP 339.

other assets of Metropolitan Transit and Seattle Transit.<sup>16</sup> In 1973, Metro did not operate an Airporter service between the Airport and Seattle. Rather, it operated only a regular city bus service or “milk run.”<sup>17</sup>

In 1986, one year after Evergreen acquired its CPCN, Metro introduced Route 194.<sup>18</sup> The new Route 194 was the first Metro bus to provide an Airporter-like service that either Metro or its two privately owned predecessors had ever offered.<sup>19</sup> At first, 194 offered little competition to Evergreen because of the infrequency of service and long transit times, among other things.<sup>20</sup> But Metro repeatedly improved the service to airline passengers until—as the lower court found—by 2008, Metro’s 194 had effectively *fully duplicated* Evergreen’s CPCN-protected Airporter, both in service and area.<sup>21</sup> And as the undisputed evidence showed, the result of Metro’s duplication of the Airporter operations

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<sup>16</sup> *Id.* Unlike Evergreen’s purchase, however, the WUTC did not transfer the CPCN rights to Metro. Rather, the WUTC extinguished the CPCNs. CP 273-74; *see also* CP 998-99, conclusion No. 5. Metro and other transit agencies do not receive operating authority from the WUTC. Rather, their rights and limitations are defined by statute, such as RCW 35.58.240.

<sup>17</sup> CP 1240, 1274-75.

<sup>18</sup> CP 341.

<sup>19</sup> *See Id.*

<sup>20</sup> CP 1240-42.

<sup>21</sup> CP 168-170 (RP 43-45).

protected by Evergreen's CPCN was skyrocketing Metro ridership coupled with devastating losses suffered by Evergreen.<sup>22</sup>

The state's policy behind granting the exclusive CPCN right was to encourage private companies to invest in (and maintain) infrastructure, equipment, and personnel to serve the neglected passenger market between Sea-Tac Airport and downtown Seattle.<sup>23</sup> Accordingly, Evergreen paid several million dollars for its CPCN, under a reasonable expectation that its exclusive rights granted via the CPCN would be protected from governmental or private interference.<sup>24</sup>

The language of Evergreen's CPCN delineates the scope of its exclusive property right: to provide a direct scheduled bus service to airline passengers<sup>25</sup> along a direct route between "Seattle and the Seattle-Tacoma Airport."<sup>26</sup>

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<sup>22</sup> CP 175-185.

<sup>23</sup> CP 1273-74.

<sup>24</sup> CP 1243-51. *See* CP 1239-40. Evergreen acquired all the rights of its predecessor in interest, Western. Thus, the CPCN has continued uninterrupted since before 1966.

<sup>25</sup> CP 1252-60.

<sup>26</sup> *Id.*; *see also* WAC 480-30-036 ("'Area' means a defined geographical location.").

The court below agreed with Evergreen that by 2008 Metro had duplicated both the service and area protected by Evergreen's CPCN.<sup>27</sup>

But the court failed to find an "extension" by Metro:

It appears to me that the two services have been operating contemporaneously for just about as long as anybody can remember.

If it was a situation where Gray Line was operating this service and Route 194 didn't exist and there was not a bus service that was in the same geographical area and then Metro suddenly offered this service, then I think Evergreen would have a pretty good argument that the statute would apply, but it's undisputed that that is not the factual situation that we are under here.<sup>28</sup>

Contrary to the court's statement, it is undisputed that Route 194 did not even exist until 1986, a year after Evergreen acquired its CPCN.

Moreover, from 1986, King County repeatedly and incrementally improved the service by, *inter alia*, expanding the frequency and operating hours, as well as eliminating stops to improve the direct nature of the 194 route.<sup>29</sup>

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<sup>27</sup> CP 168-170 (RP 43-45).

<sup>28</sup> CP 170.

<sup>29</sup> *See generally*, CP 1240-42, 1279-1378.

The undisputed record further shows that Metro made massive improvements to Route 194 beginning in 2003.<sup>30</sup> Metro management made several internal decisions to change Route 194, creating service that is substantively indistinguishable from the service described in Evergreen’s CPCN. Metro even promoted Route 194 as an “Airporter” service, advertising it to airline passengers on its Web site and in brochures as “Fly Metro — Sea-Tac Airport,”<sup>31</sup> and noting the increasing number of airline passengers with luggage that it was capturing by its efforts.<sup>32</sup> Indeed, the County does not dispute that its efforts resulted in significant reduction in ridership on Evergreen’s Airporter service.

Because of Metro’s substantial expansion and refinement of Route 194 beginning in 2003—and consequent greater taking and damage to Evergreen’s CPCN—Evergreen first filed a claim for compensation with King County, which King County denied.<sup>33</sup> Evergreen then filed the complaint below for the damage that Metro inflicted on Evergreen’s

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<sup>30</sup> *Id.*

<sup>31</sup> CP 1262; *see also* CP 1309-15.

<sup>32</sup> *See, e.g.*, CP 1286.

<sup>33</sup> CP 1627, 1633.

valuable CPCN under RCW 35.58.240, the federal and state constitutions, and 42 U.S.C. § 1983.

## V. ARGUMENT

### A. The Standard Of Review In This Case Is De Novo.

Because this appeal is from two orders granting dismissal under CR 56, this Court's review is de novo. *E.g., Lunsford v. Saberhagen Holdings, Inc.*, \_\_\_ Wn.2d \_\_\_, 208 P.3d 1092, 1095-96 (2009).<sup>34</sup> Furthermore, the court views all facts and accords all inferences in a light most favorable to Evergreen, which was the nonmoving party. *Lunsford*, 208 P.3d at 1095-96. The Court will uphold the orders granting summary judgment only "if there [was] no genuine issue of material fact and the moving party [was] entitled to judgment as a matter of law. *Id.*; see also *Wash. State Farm Bureau Fed'n v. Gregoire*, 162 Wn.2d 284, 300, 174 P.3d 1142 (2007).

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<sup>34</sup> "We review summary judgment de novo, engaging in the same inquiry as the trial court and viewing the facts and reasonable inferences from those facts in the light most favorable to the nonmoving party." 208 P.3d at 1095-96 (quoting *City of Spokane v. Spokane County*, 158 Wn.2d 661, 671, 146 P.3d 893 (2006)).

**B. This Case Involves Important Constitutional Property Rights Issues.**

When it comes to property rights, the courts are a critical bulwark against the excesses of government actions, intentional or otherwise. The cautionary words of Justice Oliver Wendell Holmes in the landmark takings case of *Pennsylvania Coal Co. v. Mahon*, remain just as applicable today as then:

We are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.<sup>35</sup>

Given the amorphous nature of intangible property and the difficulty of determining when and how an intangible property right has been damaged, courts should be even more vigilant in protecting owners of intangible property rights.<sup>36</sup> An incremental taking that occurs slowly but surely over a long period may not be recognized as such by the government, as

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<sup>35</sup> 260 U.S. 393, 416, 43 S. Ct. 158, 67 L. Ed. 322 (1922).

<sup>36</sup> See *City of Oakland v. Oakland Raiders*, 32 Cal. 3d 60, 68, 646 P.2d 835, 184 Cal. Rptr. 673 (1982) (recognizing that in some eminent domain proceedings the intangible right was the most valuable “property” acquired); see also Ellen Z. Mufson, Note, *Jurisdictional Limitations on Intangible Property in Eminent Domain: Focus on the Indianapolis Colts*, 60 Ind. L.J. 389, 390 (1985) (“Property which is intangible, however, creates great difficulty in applying a territorial rule because of the inability to ascertain the property’s exact location.”).

occurred here. Thus, the present case has important implications beyond its own facts because it demonstrates a strong need for this Court to protect intangible property from abuses by municipal governments.<sup>37</sup>

Evergreen’s second and third causes of action are based directly and indirectly on constitutional claims, while the first cause of action is statutory, based on RCW 35.58.240. The statute requires that King County, as a metropolitan municipal corporation that had extended its operations into the service and area protected by Evergreen’s CPCN, “shall by purchase or condemnation acquire at the fair market value . . . that portion of the operating authority and equipment representing the services within the area of public operation.”<sup>38</sup> But the statute—passed in 1971—likewise must be construed in light of the constitutional proscription against confiscation of property. Given this Court’s long-standing decisions holding that CPCNs constitute protected property,<sup>39</sup> the legislature can be presumed to have intended Section 240 to at least meet

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<sup>37</sup> “The power of eminent domain claimed by the City [of Oakland] in this case is not only novel but virtually without limit. This is troubling because the potential for abuse of such a great power is boundless.” *Oakland Raiders*, 32 Cal. 3d at 76 (Bird, C.J., concurring and dissenting).

<sup>38</sup> RCW 35.58.240.

<sup>39</sup> See discussion in Section V(C), *infra*.

the minimum requirements of the state and federal constitutions, if not go beyond them.<sup>40</sup>

Because of the constitutional foundations underlying this case, Evergreen will first address the constitutional claims and then the statutory claim. As will be evident, the Court should reverse all the dismissals and hold that Evergreen is entitled to compensation for its losses based on all three of its causes of action.

**C. The Federal and Washington State Constitutions Require That King County Compensate Evergreen for Damaging Its CPCN.**

Under the power of eminent domain, a government may take privately owned property and convert it to public use. Government is prohibited from taking a property right for public use, however, without first affording the affected party due process and paying just compensation. Even though King County failed to formally exercise its power of eminent domain, it nevertheless inversely condemned and damaged Evergreen's CPCN, and thus it must pay fair compensation to

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<sup>40</sup> *In re Borchert*, 57 Wn.2d 719, 735, 359 P.2d 789 (1961) (“In a long line of cases, the Federal Supreme Court has held that a right arising under the federal constitution can no more be impaired by a state constitution than by a state statute because both are laws within the meaning of the federal constitution.”).

Evergreen for the public use of the service and area over which Evergreen has a statutorily-granted quasi-monopoly.

1. The constitutions protect private property owners from uncompensated governmental takings or damages.

The superior court committed clear error when it dismissed Evergreen’s constitutional claims because it found no “extension. The effect of the court’s ruling is to allow Metro to slowly but surely take a substantial portion of Evergreen’s intangible—but well-recognized—property without just compensation. As set out above, Article I, Section 16 (Amendment 9), of the Washington State Constitution provides that “[n]o private property shall be taken or damaged for public or private use without just compensation having been first made . . . .” The Takings Clause of the Fifth Amendment of the United States Constitution similarly states, “[N]or shall private property be taken for public use, without just compensation.”<sup>41</sup> Because the Washington Constitution explicitly encompasses damages as well as takings, Washington courts generally offer greater protection of property than their federal counterparts.<sup>42</sup>

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<sup>41</sup> U.S. Const. amend. V.

<sup>42</sup> See Cristin Kent, Comment, *Condemned if They Do, Condemned if They Don’t: Eminent Domain, Public Use Abandonment, and the Need for Condemnee Protections*, (FOOTNOTE CONT’D)

Unchecked, the sovereign power of eminent domain can be readily abused by government. In fact, legal scholars have recognized the potential abuses inherent in the power of eminent domain and have greatly expanded the definition of “condemnation” to protect private property owners from governmental takings, including the expansion of the scope of condemnation to allow takings claims when private property is damaged by mere governmental negligence.<sup>43</sup>

In the present case, King County’s actions go well beyond mere negligence. Metro’s establishment of Route 194 in 1986, as well as its intensive efforts after 2003 to expand service and to market and target the 194 service to airline passengers, was not merely intentional. Far more so, it was part of an extensive and deliberate plan and design to increase Metro’s share of the very market from which it was barred by statute and the constitutions. Moreover, in spite of Evergreen’s filing a claim and

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30 Seattle U. L. Rev. 503 (2007) (comparing Wash. Const. art. I, § 16 (amended 1920) (giving judges the power to determine which government projects constitute a public use), with *Berman v. Parker*, 348 U.S. 26, 75 S. Ct. 98, 99 L. Ed. 27 (1954)).

<sup>43</sup> See A.W. Gans, Annotation, *Damage to Private Property Caused by Negligence of Governmental Agents as “Taking,” “Damage” or “Use” for Public Purposes, in Constitutional Sense*, 2 A.L.R. 2d 677 (1948); see also Stanley H. Barer, Comment, *Distinguishing Eminent Domain From Police Power and Tort*, 38 Wn. L. Rev. 607 (1963).

then a complaint, King County abused its power of eminent domain by steadfastly refusing to compensate Evergreen for its partial taking and damaging of Evergreen's CPCN. This Court should check King County's unconstitutional takings so as to protect Evergreen, as well as other current and future owners of intangible property, from such governmental takings.

2. Evergreen has a right of action for inverse condemnation because King County deprived Evergreen of its property without compensation.

Contrary to the superior court's ruling, an action for inverse condemnation does not require proof of any type of "extension." In fact, an action for inverse condemnation arises whenever the government violates the prohibition on unconstitutional deprivation of property without compensation.<sup>44</sup> According to this Court, an inverse condemnation claim has five elements: "(1) a taking or damaging (2) of private property (3) for public use (4) without just compensation being paid (5) by a governmental entity that has not instituted formal

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<sup>44</sup> *Lewis v. City of Seattle*, 5 Wash. 741, 32 P. 794 (1893); *Brown v. City of Seattle*, 5 Wash. 35, 31 P. 313 (1892); *Lambier v. City of Kennewick*, 56 Wn. App. 275, 279, 783 P.2d 596 (1989). *See also* Washington Pattern Jury Instructions 150.00.

proceedings.”<sup>45</sup> Based on the undisputed facts of record, Evergreen satisfied each element, requiring compensation from King County for the damage inflicted on Evergreen’s CPCN.

- a. King County has partially taken and damaged Evergreen’s CPCN.

Inverse condemnation does not require a complete deprivation of property, but will also be found when “government conduct interferes with the use and enjoyment of private property, with a subsequent decline in market value.”<sup>46</sup> In addition, the Washington Supreme Court has abandoned the distinction between a physical taking and a “damaging” by the government for the purposes of proving taking or inverse condemnation actions.<sup>47</sup> This Court explained the threshold in *Ackerman v. Port of Seattle*:<sup>48</sup>

Property in a thing consists not merely in its ownership and possession, but in the unrestricted right of use, enjoyment and disposal. Anything which destroys any of these elements of property, to that extent destroys the property itself. The

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<sup>45</sup> *Dickgieser v. State*, 153 Wn.2d 530, 535, 105 P.3d 26 (2005) (citing *Phillips v. King County*, 136 Wn.2d 946, 957, 968 P.2d 871 (1998)) (emphasis added).

<sup>46</sup> *Lambier*, 56 Wn. App. at 279.

<sup>47</sup> *Martin v. Port of Seattle*, 64 Wn.2d 309, 318, 391 P.2d 540 (1963)

<sup>48</sup> *Ackerman v. Port of Seattle*, 55 Wn.2d 400, 409, 348 P.2d 664 (1960) (quoting *Spann v. City of Dallas*, 111 Tex. 350, 355, 235 S.W. 513 (1921)).

substantial value of property lies in its use. If the right of use be denied, the value of the property is annihilated and ownership is rendered a barren right.<sup>49</sup>

Analyzing Evergreen's CPCN under *Ackerman*, the two most salient property "elements" of the CPCN are, first, the right to operate the Airporter service in the area described by the permit language, and second, the right to have others excluded from providing substantially the same service. While King County has arguably not affected the first element, it has "destroyed" and "annihilated" the element of exclusivity that inheres in Evergreen's CPCN. Not only has Evergreen suffered a theoretical taking by virtue of Metro's operation of Route 194, the undisputed evidence shows that since 2003 Metro has in fact deliberately diverted hundreds of thousands of airline passengers who would otherwise have ridden Evergreen's Airporter.<sup>50</sup> Again, applying *Ackerman*, the undisputed record established that the County interfered with Evergreen's "use" and "enjoyment" of its CPCN by carrying airline passengers on the 194 who would have ridden Evergreen's bus but for the County's taking.

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<sup>49</sup> *Id.*, 55 Wn.2d at 409 (emphasis added).

<sup>50</sup> CP 175-185; *see also* CP 73-137.

Finally, the County damaged Evergreen’s “disposal” ability as to its CPCN by substantially diminishing its fair market value that a third party might pay in a sale—again as shown by undisputed evidence.<sup>51</sup> The first element of inverse condemnation is met.

- b. Evergreen’s CPCN is an intangible property right capable of condemnation by the government.
  - i. *Under both state and federal law, a CPCN is “property.”*

The Supreme Court of the United States has extended the meaning of “property” to include not only the tangible objects (Evergreen’s buses and equipment), but also “the group of rights inhering in the citizen’s relation to the physical thing” (the CPCN). *See United States v. General Motors Corp.*, 323 U.S. 373, 377-78, 65 S. Ct. 357, 89 L. Ed. 311 (1945). In fact, intangible interests have been considered property since the founding of this country. James Madison wrote: “As we have a right to our property, so we have a property in our rights.”<sup>52</sup>

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<sup>51</sup> *Id.*; CP 1238-42.

<sup>52</sup> *See* James Madison, *Essay on “Property,”* Nat’l Gazette (Mar. 28, 1792), *reprinted in The Mind of the Founder: Sources of the Political Thought of James Madison*, 186 (M. Meyers ed., rev. ed. 1981).

Because of the exclusive rights that a statutorily conferred CPCN grants, it is extremely valuable. Here, Evergreen paid millions of dollars for the CPCN that King County has been systematically destroying since 2003.<sup>53</sup> Thus, the courts of this state have long recognized that CPCNs are unquestionably property:

Clearly the permits are not subject to the arbitrary whim or caprice of the commission, once they have been issued. In this respect, a permit, once acquired and exercised, becomes a vested right, subject to being divested for cause.<sup>54</sup>

The reason, as the court went on to explain, is that “property” is construed broadly in Washington:

“Property is a word of very broad meaning and when used without qualification may reasonably be construed to include obligations, rights and other intangibles as well as physical things.” [Citation omitted.] And property “. . . is a term of broad significance, embracing everything that has exchangeable value, and every interest or estate which the law regards of sufficient value for judicial recognition.” [Citation omitted.] “The right to operate a lawful business is a property right.” [Citation omitted.]<sup>55</sup>

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<sup>53</sup> CP 1239-40.

<sup>54</sup> *Lee & Eastes, Inc. v. Pub. Serv. Comm’n*, 52 Wn.2d 701, 704, 328 P.2d 700 (1958) (citing *Taylor-Edwards Warehouse & Transfer Co. v. Dep’t of Pub. Serv.*, 22 Wn.2d 565, 157 P.2d 309 (1945)). See also *N. Greyhound Lines, Inc. v. Dep’t of Transp.*, 34 Wn.2d 157, 207 P.2d 903 (1949).

<sup>55</sup> *Lee & Eastes*, 52 Wn.2d at 704.

Under Washington's bus statutes, a CPCN holder's exercise of its exclusive rights will not be interfered with, absent exceptional circumstances.<sup>56</sup> Over the years, a number of private carriers have applied to the WUTC for authority to compete with Evergreen, but no other regularly scheduled bus service between Sea-Tac Airport and downtown Seattle, like Evergreen's Airporter (or Metro's Route 194), has ever been permitted by the WUTC.<sup>57</sup>

Evergreen's property right of protection against competition extends not just to competing private carriers, but also to public transit agencies, such as Metro, as the Washington Attorney General stated and explained in a well-reasoned legal opinion:

King County "may not extend its operations to routes already served by a certificated carrier without acquiring the affected operating authority and equipment of the carrier."<sup>58</sup>

The protections afforded by a CPCN are the very definition of a statutory monopoly. Indeed, the Legislature's passage of RCW 35.58.240 was an implicit recognition of the constitutional property

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<sup>56</sup> CP 260-61, 1273-75. *See* RCW 81.68.040; WAC 480-30-086, 480-30-166.

<sup>57</sup> CP 259-60. *See* CP 1274-76.

<sup>58</sup> AGO 1980 No. 14, at 6.

rights of existing CPCN holders to be free of taxpayer-subsidized government competition. Moreover, the Legislature's passage of RCW 35.58.240 defines and further bolsters the scope of the property rights that Evergreen owns in its CPCN.

There should be no serious question that Evergreen's right of exclusivity in its CPCN is constitutionally protected property.

*ii. Both state and federal law prohibit taking of intangible property without compensation, the same as tangible property.*

Because a CPCN is a valuable intangible property right, it must be protected from government confiscation without compensation.<sup>59</sup> There is no requirement that the condemned property be real or tangible—intangible interests and property can be taken by the government just as easily as tangible and real property. In fact, because of the difficulty of determining exactly when and the extent to which intangible property rights are damaged, there is a high potential for abuse of the sovereign's

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<sup>59</sup> Specifically, “[p]roperty is a word of very broad meaning and when used without qualification may reasonably be construed to include obligations, rights, and other intangibles as well as physical property.” *Fidelity & Deposit Co. v. Arenz*, 290 U.S. 66, 68, 54 S. Ct. 16 (1933). See Matthew S. Bethards, *Condemning a Patent: Taking Intellectual Property by Eminent Domain*, 32 AIPLA Q. J. 81 (2004).

power of eminent domain over those intangible property rights, as this very case illustrates.<sup>60</sup>

As early as 1848, courts have recognized that intangible property could be condemned by a governmental entity.<sup>61</sup> Indeed, the U.S. Supreme Court dismissed a government's attempt to distinguish between tangible and intangible property, concluding that "[t]he distinction . . . has no foundation in reason."<sup>62</sup> In addition, the Supreme Court has consistently rejected any narrow interpretation of "property" that would limit it only to real or tangible rights. *See General Motors*, 323 U.S. at 377-78. *See also Kimball Laundry Co. v. United States*, 338 U.S. 1, 10-11, 69 S. Ct. 1434, 93 L. Ed. 1765 (1949) (laundry routes were an intangible asset that could be condemned, since they had a value ascertainable by the market); *Swan Lake Hunting Club v. United States*, 381 F.2d 238, 240 (5<sup>th</sup> Cir. 1967) (implicitly acknowledging that the right to hunt on private land is a form of intangible property in condemnation

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<sup>60</sup> *See West River Bridge Co. v. Dix*, 47 U.S. (6 How.) 507, 12 L. Ed. 535 (1848) (recognizing the danger that intangible rights in property were often destroyed when the government condemned real and personal property); *see also Oakland Raiders*, 32 Cal. 3d at 68.

<sup>61</sup> *West River Bridge Co.*, 47 U.S. at 534.

<sup>62</sup> *Id.*

action); *Oakland Raiders*, 32 Cal. 3d at 67 (“Intangible property such as choses in action, patent rights, franchises, charters or any other form of contract, are within the scope of” a taking.) (quoting 1 Nichols, *The Law of Eminent Domain* § 2.1[2] (3d ed. 1980) (“Personal property is subject to the exercise of the power of eminent domain. Intangible property . . . [is] within the scope of this sovereign authority as fully as land.”)).

Even more so in our modern age, intangible property rights often have values equivalent to or greater than the tangible. Only because the law protects such intangibles are private individuals and businesses willing to invest large amounts of money and time into acquiring and developing property, under the reasonable assumption that the government may not confiscate that property without compensation. That is precisely what occurred here—Evergreen purchased the CPCN from Western Tours at a high cost and subsequently invested a substantial amount of time and money into infrastructure to support its Airporter service, only to have King County damage its CPCN.

The facts in this case are very similar to those in *Delmarva Power & Light v. Seaford*, 575 A.2d 1089 (Del. 1990). There, Delmarva was an electric utility who had a CPCN granted by the City of Seaford to serve a

specific area with electrical service. *Id.* at 1091. Subsequently, the city took the CPCN when it began expanding its own electrical services into the areas served by Delmarva. *Id.* The Court held that while Delmarva could not prevent the city from entering Delmarva’s service area and competing with it, the city was constitutionally required to compensate Delmarva for the economic damages to its CPCN. As Evergreen argues here, the *Delmarva* court found that the city’s encroachment of the statutorily granted exclusivity element was a compensable taking.

*iii. King County is liable to Evergreen even though it did not completely deprive Evergreen of its CPCN.*

Recognizing the need to protect property owners in Washington, this Court has stated that the property owner need show only a “measurable or provable decline in market value traceable to the [defendant’s actions]” to prove a condemnation claim.<sup>63</sup> In so framing the requirements for compensation, this Court treats taking and damaging as alternatives. To be sure, this Court has rejected the argument that the rigorous “taking only” standard should apply in the modern era:

The specific purpose of the addition of language [in the Washington Constitution] beyond that of the United States

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<sup>63</sup> *Highline*, 87 Wn.2d at 13.

Constitution is to avoid the distinctions attached to the word “taking” appropriate to a bygone era. It is unnecessary to become embroiled in the technical differences between a taking and a damaging in order to accord the broader conceptual scope intended by the additional language.<sup>64</sup>

In fact, to decide otherwise would be contrary to all modern condemnation jurisprudence:

The modern and prevailing view is that any substantial interference with private property which destroys or lessens its value, or by which the owner’s right to its use or enjoyment is in any substantial degree abridged or destroyed, is . . . a ‘taking’ in the constitutional senses, to the extent of the damages suffered, even though the title and possession of the owner remains undisturbed.<sup>65</sup>

The CPCN that King County has damaged, if not taken, is property that meets the second element of inverse condemnation.

- c. King County has taken Evergreen’s CPCN rights for a public use.

King County does not deny that its own Airporter operations in derogation of Evergreen’s CPCN rights were implemented for a public purpose. Nor could it. It is difficult to imagine a use of a more public nature than operating a taxpayer-subsidized public transit route to carry

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<sup>64</sup> *Martin*, 64 Wn.2d at 317-18 (citing *Ackerman*, 55 Wn.2d 400).

<sup>65</sup> 2 Nichols, *The Law of Eminent Domain* § 6.09 (3d rev. ed. 1975). See also *Highline*, 87 Wn.2d at 13 (citing *Martin*, 64 Wn.2d at 318) (government conduct interferes with the use and enjoyment of private property, with a subsequent decline in market value).

any member of the public seeking the service.<sup>66</sup> Thus, the third element of inverse condemnation is easily met.

- d. King County admits that it has neither paid compensation for its taking nor instituted formal proceedings.

King County admits the fourth and fifth elements of an inverse condemnation: it has not compensated Evergreen for its taking and damaging of Evergreen's CPCN<sup>67</sup> and it ever commenced a formal condemnation proceeding against Evergreen.<sup>68</sup> Rather, it refuses to even acknowledge the wrongful nature of its taking.

Therefore, Evergreen has satisfied all five of the required elements of a constitutionally based takings/damages claim. The trial court was mistaken to dismiss those claims.

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<sup>66</sup> See *In re Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 121 P.3d 1166 (2005) (majority held that condemnation of a private parking garage was for a public use—public transportation).

<sup>67</sup> See CP 1627, 1633.

<sup>68</sup> *Id.*

- e. The Washington Constitution is more protective of private property rights than the federal Constitution requiring compensation for the permanent damage to a property right.

Although Evergreen submits that King County has committed a taking under the takings clauses of both the state and federal constitutions, if this Court does not agree, then the Court will need to consider whether the “damaging” clause of the Washington Constitution extends broader rights to Evergreen than does the United States Constitution and then apply that broader protection to the facts of this case. Such a determination requires a *Gunwall*<sup>69</sup> analysis, under which this Court is to examine six nonexclusive neutral factors to determine whether the Washington State Constitution extends broader rights to its citizens than does the United States Constitution.<sup>70</sup> These factors are: (a) the text of the state Constitution and (b) its parallels with the federal document; (c) state constitutional and common law history; (d) preexisting state law; (e) differences in structure between the state and federal constitutions; (f) matters of particular state interest or local concern.

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<sup>69</sup> *State v. Gunwall* 106 Wn.2d 54, 61, 720 P.2d 808 (1986).

<sup>70</sup> *Gunwall*, 106 Wn.2d at 61.

*i. The text of the state constitution and its parallels with the federal document.*

The first two *Gunwall* factors are: (1) the textual language of the state constitutional provision at issue and (2) differences in the parallel texts of the federal and state constitutions. Amended article I, section 16 of the Washington State Constitution provides:

§ 16 EMINENT DOMAIN. Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or *damaged* for public or private use without just compensation having been *first* made, or paid into court for the owner. . . .

In comparison, the takings clause of the Fifth Amendment states simply: “nor shall private property be taken for public use, without just compensation.” A significant difference is the addition of the word “*damaged*” in the State Constitution and the requirement that compensation must *first* be made. Obviously, “damaged” means something more than “taken” or both words would not have been included in the state constitution. In the ordinary sense of the word, damaged means that compensation is due if government impairs the value or usefulness of the property right, as is the case here; the property right need not be completely taken. In addition, the state constitution requires payment being made

*before* the damage has occurred; this provision is not included in the federal counterpart. Clearly under the facts of this case, this did not occur. King County has yet to pay any compensation to Evergreen even after being alerted to the damage it caused, and continues to cause, to Evergreen's CPCN.

*ii. State constitutional, common law history, preexisting state law.*

The third and fourth *Gunwall* factors require an examination of Washington constitutional and common law history. Not long after the state constitution was adopted in 1889, the Supreme Court decided *Brown v. City of Seattle*,<sup>71</sup> in which the Supreme Court found that Seattle's proposed grading of a street would decrease the value of Brown's property. The Court noted that Brown had no remedy under the federal constitution because at that time courts were construing the Fifth Amendment's takings clause to only apply to physical invasion or injury to land. The court then analyzed whether the "taken or damaged" provision of the state constitution provided a remedy for property owners whose property suffered non-physical injuries, such as impairment of access and loss of value, as a

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<sup>71</sup> 5 Wash. 35, 32 P. 214 (1893).

consequence of state action. In the end, and after reviewing other states' constitutions, the *Brown* court ruled the addition of the word “damaged” evidences an intent that the state takings clause is more protective than the federal takings clause and that injunctive relief was appropriate because of the state constitutional provision that compensation be paid before the damage occurs.<sup>72</sup>

In addition, there is pre-existing state law, codified in RCW 35.58.240, and this statute incorporates a clear legislative intent that the damage and taking of Evergreen’s valuable rights contained in its CPCN requires just compensation. Accordingly, preexisting state law incorporates and recognizes the constitutional prohibition on uncompensated takings.

*iii. Differences in structure between the state and federal constitutions.*

The fifth *Gunwall* factor requires an analysis of the structural differences between the federal and state constitutions. As noted above, there are significant differences between the two takings clauses with the addition of the word “damaged” and the requirement to pay compensation

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<sup>72</sup> *Id.* at 40, 43.

before the taking or damage in the state constitution. And this Court pointed out in *Manufactured Housing Communities of Washington v. State*,<sup>73</sup> that the United States Constitution is a grant of enumerated powers to the federal government and the Washington State Constitution serves to limit the otherwise plenary powers of the state government. Therefore, the state constitution can be looked at as a source of great protections directly reserved in the people.<sup>74</sup> These structural differences allow Washington courts to forbid the damaging of private property under Article 1, § 16 *before* compensation is paid even if the Fifth Amendment may permit such takings, or permit the payment of compensation after the fact.

*iv. Matters of particular state interest or local concern.*

The sixth and last *Gunwall* factor asks whether the clause deals with matters of particular state or local concern. Certainly the taking private property for private use is clearly a matter of local concern consistently recognized by Washington courts.<sup>75</sup> Moreover, the fact that

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<sup>73</sup> 142 Wn.2d 347, 360, 13 P.3d 183 (2000).

<sup>74</sup> *Gunwall*, 106 Wn.2d at 62.

<sup>75</sup> *State ex rel. Wash. State Convention & Trade Ctr. v. Evans*, 136 Wn.2d 811, 822, 966 P.2d 1252 (1998); *In re Seattle*, 96 Wn.2d 616, 638 P.2d 549 (1981); *Healy Lumber Co. v. Morris*, 33 Wash. 490, 509, 74 P. 681 (1903).

(FOOTNOTE CONT'D)

the legislature adopted a statute directly recognizing that the damaging of a CPCN must result in just compensation conclusively demonstrates that this is a matter of great state concern.

In the end, the *Gunwall* analysis demonstrates that the state constitution affords greater protections for the taking or damaging of intangible property and requires that just compensation be paid before the damage, unlike the federal constitution. Not only is it a matter of government paying damages, but as in *Brown*, the state constitutional provision, also unlike the federal constitution, supports issuance of an injunction to stop the continued interference with a valuable property right.

**D. RCW 35.58.240 Requires That King County Compensate Evergreen for Partially Taking and Damaging Its CPCN.**

In implicit recognition of the property rights of CPCN holders, the Legislature in 1971 prohibited transit agencies like Metro from competing with the CPCN owner by amending RCW 35.58.240. The law now provides, in relevant part:

In the event any metropolitan municipal corporation shall extend its metropolitan transportation function to any area or

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service already offered by any company holding a certificate of public convenience and necessity from the Washington utilities and transportation commission under RCW 81.68.040, it shall by purchase or condemnation acquire at the fair market value, from the person holding the existing certificate for providing the services, that portion of the operating authority and equipment representing the services within the area of public operation.

*Id.* (emphasis added).<sup>76</sup>

Thus, King County may not incrementally destroy a CPCN holder's major investment in its infrastructure and operations once the private service is established.<sup>77</sup> Although Metro has the legal right to establish an expedited passenger service like Evergreen's Airporter, the law expressly **requires** that it must *first* pay Evergreen for the CPCN covering the same route and termini that Metro wants to serve.

While the superior court correctly found that Metro was operating a similar service in the same geographical area as Evergreen, it erroneously failed to recognize that Metro had "extended" its transportation function to that area and service. That second conclusion was contrary to the facts and law before the court.

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<sup>76</sup> No appellate case law directly applies or interprets RCW 35.58.240. This is not surprising, given the narrow scope and unambiguous intent of this easily understood statute.

<sup>77</sup> *See, e.g.*, CP 1272-73.

1. The superior court erred by construing RCW 35.58.240's use of the term "extend" too narrowly to give proper effect to the Legislature's intent.

Courts must interpret statutes to ascertain and give effect to legislative intent.<sup>78</sup> When the statute's meaning is plain on its face, as it is here, the court gives effect to the plain meaning of the statute and determines the legislative intent from the language of the statute itself.<sup>79</sup> The plain meaning of the language is determined from the ordinary understanding of the language at issue, as well as its context, related provisions, and statutory scheme as a whole.<sup>80</sup>

In its oral ruling, the court defined "extension" as "somehow increasing in length, area, or scope."<sup>81</sup> In a nutshell, the court then dismissed the case because "it appears to me that the two services have been operating contemporaneously for just about as long as anybody can remember." In so doing, the court ignored the dramatic changes that Metro had made to its Route 194 service over the years—particularly since 2003—and failed to properly follow the Legislature's intent.

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<sup>78</sup> *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 813, 828 P.2d 549 (1992).

<sup>79</sup> *State v. Tvedt*, 153 Wn.2d 705, 710, 107 P.3d 728 (2005).

<sup>80</sup> *State v. Jacobs*, 154 Wn.2d 596, 600, 115 P.3d 281 (2005).

<sup>81</sup> CP 169-170.

In passing RCW 35.58.240, the Legislature did not say anything to limit the meaning of “extend” in RCW 35.58.240 to preclude claims against transit agencies already conducting bus operations that did not compete with a CPCN prior to an extension of service that does compete with an existing CPCN. Indeed, Black’s Law Dictionary also states that the word “extension” normally implies the existence of something to be extended.<sup>82</sup> The normal, everyday definition of “extend” connotes an expansion or enlargement.<sup>83</sup>

Furthermore, the Attorney General did not restrict the definition of “extend” to mean “new” or “physical” invasions into property.<sup>84</sup> That is because “extend” can also mean to “boost, . . . expand, . . . beef (up), . . . [or] magnify.”<sup>85</sup> In Washington, an extension has also been equated to an improvement or enlargement.<sup>86</sup>

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<sup>82</sup> Black’s Law Dictionary 622 (2004 8<sup>th</sup> ed.).

<sup>83</sup> *Id.*

<sup>84</sup> AGO 1980 No. 014, at 6.

<sup>85</sup> *Webster’s Collegiate Thesaurus* 291 (1988). *See also Legal Thesaurus* 217 (William C. Burton ed., 1985) (stating “extension” is synonymous with “expansion,” “supplementation,” and “broaden”).

<sup>86</sup> *See* RCW 43.180.300(4), 47.60.010.

Thus, all definitions of the word “extend” normally imply the existence of something previously existing that is then extended. Metro’s actions fit this definition: improvements and enlargements of the already existing service from Sea-Tac to downtown Seattle that greatly expanded the damage to Evergreen’s CPCN.<sup>87</sup>

Another important principle of construction is that courts construe statutes to give effect to all the language and render no portion of the statute meaningless or superfluous.<sup>88</sup> Here, the superior court’s definition of “extension,” limiting it to only new operations and to physical takings, would render the statute useless after the initial commencement of bus transportation operations by a metropolitan municipal corporation. Essentially, under the superior court’s ruling, a current CPCN-holder would never be able to make a claim against a governmental entity unless there was some sort of wholly new type of overt and physical taking. This strained interpretation would render the broad, open-ended language of the statute nugatory.

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<sup>87</sup> CP 174-185. *See also* Second Declaration of James Jordan (Reply Attach. E, Docket No. 80), Ex. 25: Rutherford Dep. at 51-54, CP \_\_\_ - \_\_\_ (plaintiff will file a supplemental designation of clerk’s papers to add this declaration).

<sup>88</sup> *Lakemont Ridge Homeowners Ass’n v. Lakemont Ridge Ltd. P’ship*, 156 Wn.2d 696, 699, 131 P.3d 905 (2006).

Finally, if this Court finds it helpful to consider the legislative history, it will find that in passing RCW 35.58.240, not only did the Legislature not want competition to occur between private bus companies (as set forth in RCW 81.68.040), it also did not want any competition between private carriers and public transit agencies, such as Metro. Thus, the legislative history behind RCW 35.58.240 reflects the strong legislative intent that Metro should not compete in any way with private carriers without compensation flowing to them. To ensure the intent of the amendment adding the protections in RCW 35.58.240 on which Evergreen's claim is based was clear, Representative Smythe stated:

The proviso says they [metropolitan authority] cannot go into the charter business. They can lease their equipment out to a charter company, however, to provide certain charter services in the city. They cannot compete in any way with the private companies.<sup>89</sup>

The legislature intended to prohibit any competition between Metro and private carriers like Evergreen.

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<sup>89</sup> *House Journal of the Forty-Second Legislature of the State of Washington, 1809 (1971) (emphasis added).*

2. The superior court's narrow definition would also improperly render RCW 35.58.240 unconstitutional under the Washington State Constitution.

If upheld, the effect and consequence of the superior court's erroneous definition of "extension" would be that RCW 35.58.240 allows for unconstitutional takings of private property without compensation. When faced with two possible definitions of a key term in a statute, a court should not choose the definition that renders the statute unconstitutional.

As noted above, to properly apply RCW 35.58.240, the nature of a CPCN as property coupled with the constitutional limitations on governments' powers to take property must be understood and respected. Thus, the superior court's definition is far too narrow given the purpose of the statute and this Court's broad application of Article I, Section 16, of the Washington Constitution to include both physical takings of and damages to property. Given this backdrop, and since no appellate court has yet interpreted RCW 35.58.240, this Court should look to analogous eminent domain cases for guidance on how to apply the statute to the undisputed facts of this case.

In interpreting the Washington Constitution, this Court has rejected the argument that “interference with property rights must be ‘substantial’ before it can amount to a compensable injury.”<sup>90</sup> In *Highline School Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6, 548 P.2d 1085 (1976), this Court upheld the plaintiff’s condemnation claim even though the condemning acts were not “new,” but rather increased an already existing service. In that case, this Court held that an inverse condemnation claim arose when Sea-Tac Airport began routing more and more planes over a private landowner’s property. The noise created by the planes amounted to a physical damaging of the property by a governmental entity and required compensation to the private landowner. Accordingly, this Court found that a new service was not required, but rather an increase (consistent with the normal definition of “extension”) of an already existing service would satisfy the requirements for a takings claim.<sup>91</sup> Essentially, “[a] new cause of action thus accrues with each measurable or provable decline in market value.”<sup>92</sup> Thus, the superior court’s view that extension requires an

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<sup>90</sup> *Highline*, 87 Wn.2d at 13 (citing *Martin*, 64 Wn.2d at 318).

<sup>91</sup> CP 1300-02.

<sup>92</sup> *Highline*, 87 Wn.2d at 15.

entirely “new” or different type of overt act is erroneous and inconsistent with an overriding purpose of RCW 35.58.240, which must be read to be consistent with the Washington Constitution.

3. King County did extend its operations into the service and area protected by Evergreen’s CPCN, thereby requiring King County to purchase Evergreen’s Airporter.

Based on a proper interpretation of the statutory definitions discussed above, to prove an extension under RCW 35.58.240, Evergreen must simply show that Metro improved, enlarged, expanded, or magnified Route 194 within the area or service protected by Evergreen’s CPCN. The undisputed facts before the Court below proved this.

Consistent with the normal definition of “extension,” Metro extended into a service and area covered by Evergreen’s Airporter by, *inter alia*: (a) *improving* Route 194 by decreasing stops, (b) *increasing* the number of buses serving Route 194, and (c) *developing* Route 194 through an extensive marketing campaign. All these acts, either independently or in concert, boosted King County’s ridership numbers (while at the same time reducing Evergreen’s riders and market share) and therefore fall within the definition of “extension.” In this case, King County’s actions are precisely the type that trigger the protections of RCW 35.58.240.

When Evergreen acquired the CPCN, Metro did not provide an express Airporter service from Sea-Tac to downtown Seattle.<sup>93</sup> In 1985, Metro's limited bus service from Sea-Tac was indirect, making multiple street stops in its lengthy trip to the airport.<sup>94</sup> Because Metro's route operated like a typical municipal bus route with multiple stops between Federal Way, Sea-Tac, and downtown Seattle, it was a vastly different service to a different area than that protected by Evergreen's CPCN.<sup>95</sup>

Thereafter, Metro deliberately reconfigured and improved its Airporter route to be more expedited and to run more frequently, which resulted in an increase in Route 194 ridership and a corresponding decrease in Evergreen's ridership.<sup>96</sup> Since 2003, Metro's reconfiguration has swayed hundreds of thousands of airline passengers to take Metro's 194 instead of Evergreen's Airporter.<sup>97</sup> Accordingly, Metro's express and deliberate plan to specifically target the very same airline passengers protected by Evergreen's CPCN, through the implementation and

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<sup>93</sup> CP 1240.

<sup>94</sup> *Id.*

<sup>95</sup> CP 340-41, 1240, 1274-75.

<sup>96</sup> *E.g.*, CP 1241-42.

<sup>97</sup> CP 175-178, 180-185.

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<sup>96</sup> *E.g.*, CP 1241-42.

<sup>97</sup> CP 175-178, 180-185.

modification of Route 194, was incredibly effective: Metro did in fact “increase [its market] share,” which has detrimentally impacted the value of Evergreen’s CPCN.<sup>98</sup>

As stated above, the definition of “extension” includes improvements, expansions, magnifications, and enlargements. The following is a list of just some of Metro’s actions that were before the court below, which constitute an extension into the area and service protected by Evergreen’s CPCN:

- Improvement: Metro now markets Route 194 as an express Airporter service: “Fly Metro—Sea-Tac Airport.”<sup>99</sup>
- Improvement: Metro’s published schedules establish that it is offering the same type of expedited service as Evergreen’s Airporter: “Rt. 194 (express service between downtown and the airport), **very well-used by airline travelers** . . . .”<sup>100</sup>

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<sup>98</sup> CP 175-185, 1300-02.

<sup>99</sup> CP 1262.

<sup>100</sup> CP 1286.

- Improvement: Metro admitted that in late 2003 to early 2004, it had “[i]nitiate[d a] marketing plan for air travelers to use transit” in order to significantly increase its ridership.<sup>101</sup>
- Improvement: Metro made several changes in its routing, which reduced transit time between Sea-Tac and Seattle.<sup>102</sup>
- Improvement: In 2003, Metro made the route even more direct by eliminating stops and “operating between downtown Seattle and SeaTac Airport only,” also doubling the frequency of service during peak hours.<sup>103</sup>
- Expansion/Enlargement: As Metro’s airline passenger market share has steadily increased, Evergreen’s share has declined—not surprisingly given the similarity of the two services and Metro’s taxpayer subsidized fare.

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<sup>101</sup> CP 1322.

<sup>102</sup> Specifically, King County employee Jack Lattemann admitted that (a) “[d]ue to improved routing, travel time in 1986 [after Evergreen obtained the CPCN] between downtown Seattle and the airport on new route 194” went from “41 minutes” down to “27 to 28 minutes,” (b) Metro later expanded Route 194’s hours of operation, and (c) Route 194 now allows passengers to bring their airport-bound luggage on board. CP 1163-95.

<sup>103</sup> CP 1267-69, 1531-44.

- Expansion/Enlargement: By the end of 2004, Metro was touting that it had increased its market share of airline passengers traveling from Sea-Tac to downtown Seattle and back on its newly expedited and more frequent Route 194 by 25 percent.<sup>104</sup> In fact, Metro has now admitted that 30 to 37 percent of Route 194 passengers are airline passengers with luggage.<sup>105</sup>

In sum, it is not disputed that Route 194's service has evolved incrementally since its inception in 1986, and dramatically since 2003, to the point that even the superior court agreed that it is now *identical* to that covered by Evergreen's CPCN. King County itself has admitted that it regularly and directly serves airport-bound passengers (and their baggage) from the downtown Seattle area—in other words, “Fly Metro.”<sup>106</sup> Accordingly, the superior court should have ruled that King County had

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<sup>104</sup> CP 1322.

<sup>105</sup> Second Declaration of James Jordan (Reply Attach. E, Docket No. 80), Ex. 25: Rutherford Dep. at 42, 54, CP \_\_\_\_\_, \_\_\_\_\_ (plaintiff will file a supplemental designation of clerk's papers to add this declaration).

<sup>106</sup> King County's Web site, at <http://metro.kingcounty.gov/tops/bus/destinations/flymetro.html>. See also CP 1167, 1262-65.

extended into the area and service protected by Evergreen's CPCN, invoking the buy-out obligation of RCW 35.58.240.

4. Simple logic, based on undisputed facts, shows that the superior court's conclusion cannot be correct.

Based on the evidence summarized above, the superior court correctly found, in its oral ruling on January 19, 2009, that Metro's Route 194 is *currently* providing its transportation function in exactly the same area and essentially the same service as Evergreen's Airporter.<sup>107</sup> Since Metro operated no buses at all prior to 1973, and did not operate its Airporter Route No. 194 until 1986, it defies logic for the court to have found that Metro did not "extend" its service under RCW 35.58.240.

At some point in time, Metro must have extended into the area and service covered by Evergreen's CPCN. As a result, the internal inconsistencies in the lower court's rulings constitute plain and clear error.

**E. 42 U.S.C. § 1983 Requires That King County Compensate Evergreen.**

As discussed above, King County violated Evergreen's Fifth Amendment right to not have its private property taken for public use without just compensation. Thus, Evergreen included a cause of action in

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<sup>107</sup> CP 168-169 (RP 43-44).

its complaint under 42 U.S.C. § 1983 because King County, acting under the color of state law, deprived Evergreen of a right secured by the U.S. Constitution. The superior court erroneously dismissed Evergreen's Section 1983 cause of action because it failed to find an unconstitutional taking.

42 U.S.C. § 1983 prohibits a county acting under the color of state law from depriving a citizen of "any rights, privileges, or immunities secured by the Constitution and laws."<sup>108</sup> Under Section 1983, Evergreen need only show that King County acted under color of state law in depriving Evergreen of a federal constitutional or statutory right.<sup>109</sup> Here, it is undeniable that King County, acting under the color of state law, has deprived Evergreen of its Fifth Amendment right not to have its private property taken for public use without just compensation, and thus has violated Section 1983.

First, King County acted under the color of state law by assuming Metro's functions and obligations under RCW 35.58.010, and under state-

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<sup>108</sup> See *Robinson v. City of Seattle*, 119 Wn.2d 34, 57-58, 830 P.2d 318 (1992); *Lutheran Day Care v. Snohomish County*, 119 Wn.2d 91, 118, 829 P.2d 746 (1992) (citing *Monell v. Dep't of Soc. Servs. of N.Y.*, 436 U.S. 658, 98 S. Ct. 2018, 56 L. Ed. 2d 611 (1978)) (stating that a city or county can be considered a "person" under Section 1983).

<sup>109</sup> *Robinson*, 119 Wn.2d at 58.

county statutes authorizing public transportation.<sup>110</sup> Second, King County deprived Evergreen of a constitutional right. As discussed above, the lower court's conclusion to the contrary was erroneous. Section 1983 has been frequently invoked in situations in which a government violates the Takings Clause of the United States Constitution,<sup>111</sup> and therefore the superior court erred in denying Evergreen's Section 1983 claim.

## VI. CONCLUSION

Because of the important and novel questions of first impression implicated here, and the public policy ramifications, the Court should accept direct review, to clarify the law regarding piecemeal governmental taking of intangible property, reverse the orders entered below, and find that the Superior Court erred because it:

1. Failed to recognized that King County took and damaged Evergreen's CPCN—a protected intangible property right—without paying compensation and in violation of both the federal and Washington State Constitutions as well as 42 U.S.C. § 1983; and
2. Interpreted RCW 35.58.240 improperly and too narrowly in finding that the County did not “extend” its transportation function into a service or area protected by Evergreen's CPCN.

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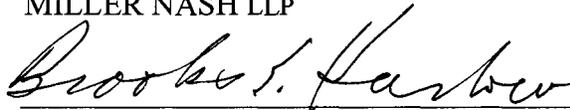
<sup>110</sup> King County Charter § 350.20.30.

<sup>111</sup> Kenneth B. Bley, *Use of the Civil Rights Acts to Recover Money Damages for the Overregulation of Land*, 14 Urb. Law. 223, 225 n.12 (1982).

Finally, this Court should remand the case to the Snohomish County Superior Court with directions to enter summary judgment on liability in favor of Evergreen based on the undisputed facts of record and proceed to trial promptly to determine the amount of damages Evergreen is entitled to recover from King County.

DATED this 2nd day of July, 2009

MILLER NASH LLP

A handwritten signature in cursive script, appearing to read "Brooks E. Harlow", written over a horizontal line.

LeAnne M. Bremer, WSB No. 19129

Brooks E. Harlow, WSB No. 11843

Adam B. Jussel, WSB No. 40936