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No. 97410-1

No. 94588-8

SUPREME COURT
OF THE STATE OF WASHINGTON

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

Appellants,

v.

PORT OF BENTON, a Washington port district,

Respondent,

and

STATE OF WASHINGTON, DEPARTMENT OF REVENUE,

Defendant,

and

UNION PACIFIC RAILROAD COMPANY,
a Delaware corporation,

Intervenor Plaintiff,

and

BNSF RAILWAY COMPANY, a Delaware corporation,

Respondent.

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A. INTRODUCTION

The brief submitted by the Port of Benton (“Port”) and the BNSF Railway Company (“BNSF”) is remarkable on a number of grounds. First, by submitting a joint brief, the Port/BNSF document the fact that they are in bed together, and are combining to maintain BNSF’s rent-free use of public railroad tracks in perpetuity.

Second, the Port/BNSF brief largely concedes the factual recitation in the opening brief of Randolph Peterson and other taxpayers (“Peterson”). Apart from a promised \$50,000 payment by BNSF, BNSF has made no payments for use of the Port’s public railroad tracks since 2009 and will *never* have to make any payment for their use in perpetuity. This is so, despite the wear and tear caused to the tracks by BNSF railroad cars.

Third, the Port/BNSF have abandoned any other alleged justifications for their actions¹ and focus only on Peterson’s state constitutional arguments. They simply misstate the test for violations of article VIII, § 7 and article I, § 12 of the Washington Constitution. They import an entirely novel interpretation of article VIII, § 7, in which an entity using public facilities can substitute “economic development” for

¹ The Port/BNSF contended below that the issues here were federally preempted. The trial court ruled against them. CP 2032; RP 100-01. They have abandoned that argument on review. Br. of Resp’ts at 13 n.6.

tangible consideration to the public entity, and article I, § 12 claiming its anti-favoritism policy applies only when a law is enacted providing for governmental favoritism.

This Court must reject the Port/BNSF's effort to gut constitutional restrictions on government largesse to private enterprise and vindicate the restrictions set forth in the Washington Constitution on the ability of local governments to permit free use of public property in the guise of "economic development" and to favor selected private commercial entities at the expense of taxpayers and the public purse.

B. STATEMENT OF THE CASE

In large measure, the Port/BNSF concede the history of the case set forth in Peterson's opening brief. Br. of Appellants at 2-10. They do not deny that apart from a promised \$50,000 payment, BNSF has not paid for use of the public railroad tracks at issue here since 2009. Further, they do not deny that under their constitutional analysis, BNSF will seemingly *never* have to pay the Port for track usage in perpetuity.² Peterson noted that the Port, in fact, knew that the railroads had an obligation to pay for track usage, going so far as to force UP to pay fees under threat of contract

² Just as predicted in Peterson's opening brief at 7 n.11, the rent-free approach to track usage is too tempting for other users not to claim its benefit. Up until recently, the Union Pacific ("UP") has paid for its track use. It gave notice to the Tri-Cities Railway Co. ("TCRY") that effective December 8, 2017, it will no longer pay for track use.

termination. Br. of Appellants at 24. The Port/BNSF misrepresent what Peterson argued when they assert that Peterson argued that the Port terminated UP's rights. Br. of Resp'ts at 6 n.4. The point is that the Port's conduct as to UP evidenced its understanding that it was constitutionally obligated to satisfy article VIII, § 4 as to BNSF. *See also*, Br. of Appellants at 5 n.6, 44 n.42.

Additionally, the Port/BNSF have the audacity to note that under the Indenture the Port was obligated to devote all lease payments and other revenues derived from the railroads to cover maintenance. Br. of Resp'ts at 8. The Port does not deny that it has *never* complied with that obligation. Br. of Appellants at 6 n.8.

The Port/BNSF do not dispute TCRY's role with regard to the tracks.³ TCRY is essentially the Port's agent for the routine maintenance of the tracks. Br. of Appellants at 5-6. The Port did not pay TCRY for such services. Rather, their agreement understood that TCRY would be paid by the railroads that actually used the tracks. *Id.* Simply put, without fees collected from the BNSF or UP at the Port's direction, the TCRY/Port

³ Nor do the Port/BNSF dispute the fact that the Port attempted to coerce Peterson into dropping this action by threatening heavy taxation against TCRY. Br. of Appellants at 8 n.13.

agreement was economically unsustainable.⁴ Moreover, the Port/BNSF misstate the Port's role in paying for track maintenance when they claim in a footnote that TCRY pays for *all* track maintenance. Br. of Resp'ts at 21 n.12. The Port's *own documents* disclose its intent to seek *millions of dollars* in major capital expenditures to upgrade the tracks as part of a Master Plan. Br. of Appellants at 26-27. The Port (and its taxpayers), not TCRY, paid, and will pay, for major improvements. CP 1440.

The Port/BNSF do not dispute the fact that BNSF cars cause wear and tear to the tracks, or that the public will be forced to pay for BNSF's harm to the tracks. Br. of Appellants at 4-5, 26-27. Specifically, not only will the BNSF not pay a dime of rent for track usage into the indefinite future, its tracks will cause damage to the tracks by wear and tear, and the Port's taxpayers will be expected to pick up the tab for such damage.

Perhaps the most egregious of their factual misstatements to attempt to defeat the constitutional issues Peterson presents is the Port/BNSF conflation of the consideration for the Port's receipt of the tracks from the federal government as surplus property, with the consideration owed to the Port as a Washington governmental entity under the Washington Constitution for BNSF's use of public property.

⁴ This may be the Port's intention in order to take over track maintenance and charge the railroads fees for track usage on its own. Br. of Appellants at 45 n.43.

The predecessors to UP and BNSF entered into an agreement with the federal government in 1947 for the tracks' construction. Those railroads each paid \$50,000 for rent-free use of the tracks, subject to termination of the usage agreement upon 6 months' notice. Br. of Appellants at 3. The federal government could make an agreement, that gifts BNSF with rent-free track usage as it is unencumbered by constitutional restrictions like article VIII, § 7 of the Washington Constitution. For 21 years, that arrangement remained in place – 21 years of rent-free track usage by BNSF.

When the United States Department of Energy (“DOE”) declared the tracks and other property to be surplus in 1998 and transferred that property to the Port, DOE was again not subject to any constitutional restrictions like article VIII, § 7, as was the Port. There was “consideration” for the transfer, however. The Port received land, buildings, and the tracks, subject to prior federal agreements with the railroads, but DOE received the benefit of relinquishing any obligation to maintain the buildings and the tracks, many of which were in need of significant public expenditures, as the Port/BNSF readily concede when they note the extensive costs that faced DOE, including clean up of contaminated properties. Br. of Resp'ts at 7. But this “consideration” received by the Port from DOE for receipt of surplus federal properties is

irrelevant to the grossly inadequate consideration the Port received from BNSF for track usage.

What is critical to the Court’s analysis is the fact that although the Port “inherited” DOE’s contractual arrangements with BNSF, it is *undisputed* that the Port was subject to Washington constitutional obligations when it did so. The Port had to satisfy article VIII, § 7 in its contractual relationship with BNSF. The Port/BNSF are obtuse to that constitutional obligation, as will be noted *infra*.

C. ARGUMENT⁵

(1) The Port/BNSF Rent-Free Deal Is a Gift of Public Facilities in Violation of Article VIII, § 7

The Port/BNSF have no answer to Peterson’s description of the historical basis for article VIII, § 7, br. of appellants at 14-17, and instead merely decry its applicability here. Br. of Resp’ts at 26-28. But that historical basis for the constitutional provision animates the plain language of article VIII, §§ 5, 7 – the Framers *banned* gifts of public facilities, particularly to railroads.

Rather than apply the explicit test for a gift of public facilities this Court has developed over the years, the Port/BNSF torture the case law, insisting that the test is: anything goes, so long as legal consideration is

⁵ The Port/BNSF do not dispute the interpretive principles for constitutional issues set forth in Peterson’s opening brief at 13.

present. Their argument is flatly wrong, and pernicious.⁶ In *CLEAN v. State*, 130 Wn.2d 782, 928 P.2d 1054 (1997), this Court applied a two-part test for determining if a gift is present:

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

Id. at 797-98.⁷

Instead of applying this Court's requisite test, the Port/BNSF simply ignore the possibility that in real world terms the consideration for a private entity's use of public facilities is so grossly inadequate as to

⁶ That grossly disproportionate consideration is evidence of donative intent is hardly surprising and, in fact, makes complete sense if the Framers' purpose in article VIII, §§ 5, 7 is to be met. For example, if the Port of Seattle gave Alaska Airlines the open-ended use of the Port's facilities at Seattle-Tacoma International Airport for a peppercorn, or \$1, "legally sufficient consideration" in the eyes of the Port/BNSF, wouldn't such an obviously sweetheart deal certainly imply that the Port's commissioners made a gift of public facilities to Alaska?

⁷ That this test controls has been confirmed in a number of decisions since *CLEAN/Taxpayers*. See, e.g., *CLEAN v. City of Spokane*, 133 Wn.2d 455, 459, 947 P.2d 1169 (1997), cert. denied, 525 U.S. 812 (1998) (applying *City of Tacoma*); *Columbia River Carbonates v. Port of Woodland*, 182 Wn. App. 1008, 2014 WL 2963955, review denied, 181 Wn.2d 1023 (2014). Division III misstated the rule of *King County* in its opinion in *Friends of North Spokane County Parks v. Spokane County*, 184 Wn. App. 105, 133-34, 336 P.3d 632 (2014), appeal after remand, 197 Wn. App. 1052 (2017), but came to the correct conclusion there that donative intent was not present due to grossly inadequate consideration. The County agreed there to amend an acceptance of dedicated parkland to allow a road easement and private construction of the road. The road would serve an adjoining residential development, and would be public.

effectively be a gift, asserting that “gross inadequacy” is a contract law question irrelevant to the constitutional analysis under article VIII, § 7. Br. of Resp’ts at 17. This Court’s precedents clearly contemplate that grossly inadequate consideration for the use of public facilities establishes donative intent.

If the Court determines that donative intent on the government’s part, either express or proven by the presence of such grossly inadequate consideration for the valuable public property that is tantamount to express donative intent, is absent, the Court then looks to the adequacy of consideration. *King County v. Taxpayers of King County*, 133 Wn.2d 584, 601, 949 P.2d 1260 (1997), *cert. denied*, 522 U.S. 1076 (1998) (“In the absence of donative intent or grossly inadequate return, the Court’s review is limited to the legal sufficiency of consideration for the lease.”). The Port/BNSF misstate the holding in *King County*. They assert that grossly inadequate consideration is irrelevant. Br. of Resp’ts at 15-18. They also claim the majority opinion in that case eschewed an analysis of consideration in conjunction with donative intent and that grossly inadequate consideration as evidence of donative intent was only of interest to the dissent. *Id.* at 17-18. They are wrong.

In *King County*, if legal sufficiency were the *only* basis upon which to analyze consideration, this Court’s analysis of consideration – the

Mariners paid substantial annual rent, agreed to contribute \$45 million in construction costs, paid construction cost overruns, maintained the facility, made major repairs and capital improvements, and agreed to share profits with the new public stadium district – would make little sense. Rather, the Court’s analysis focused squarely on *donative intent*, as evidenced by allegedly grossly inadequate consideration. *Id.* at 598-601.⁸ The Court specifically noted at 601: “In the absence of donative intent or grossly inadequate consideration, the Court’s review is limited to the legal sufficiency of the consideration for the lease.” The Court cited *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wn.2d 679, 743 P.2d 793 (1987) for this point. There, this Court made the rule even plainer, stating at 703:

We use the donative intent element to determine how closely we scrutinize the sufficiency of the consideration, “the key factor.” *Adams v. University of Washington*, 106 Wash.2d 312, 327, 722 P.2d 74 (1986). “Unless there is proof of donative intent or a grossly inadequate return, courts do not inquire into the adequacy of consideration.” (Italics ours.) *Adams*, at 327, 722 P.2d 74; *see Scott Paper Co. v. Anacortes*, 90 Wash.2d 19, 32-33, 578 P.2d 1292 (1978). Absent a showing of donative intent or gross inadequacy, trial courts should only apply a legal sufficiency test, under which a bargained-for act or forbearance is considered sufficient consideration. *Adams*, 106 Wash.2d at 327, 722 P.2d 74.

⁸ If consideration is an issue, its adequacy is determined on the basis of legal sufficiency, whether there is value to support a promise, and is analyzed as a question of law. *Id.* at 597-98. Like the Port/BNSF, the trial court misapplied this necessary test. RP 102.

Applying the correct test, the Port/BNSF deal violated article VIII, § 7.

(a) Fundamental Governmental Purpose

The Port/BNSF do not contest the argument set forth in Peterson's opening brief that the operation of the Port's tracks does not constitute a fundamental governmental purpose within the meaning of the article VIII, § 7 analysis. Br. of Appellants at 20-21. It does not bear the earmarks of more clearly fundamental government activities.⁹

(b) Donative Intent Was Present Here¹⁰

Having improperly articulated this Court's article VIII, § 7 protocol in which donative intent can be documented by grossly inadequate consideration, it is hardly surprising that the Port/BNSF give scant attention to the Port's donative intent in giving BNSF rent-free use

⁹ Br. of Appellants at 21 n.24. *See also, Hudson v. City of Wenatchee*, 94 Wn. App. 990, 974 P.2d 342 (1999) (police offering free assistance to citizens locked out of cars was aspect of police community caretaker function, a fundamental government purpose); *Citizens Protecting Resources v. Yakima County*, 152 Wn. App. 914, 219 P.3d 730 (2009), *review denied*, 168 Wn.2d 1024 (2010) (land swap with wrecking yard moving it out of flood plain was an aspect of flood control, a fundamental government purpose).

¹⁰ Donative intent is a question of fact. *In re Estate of Little*, 106 Wn.2d 269, 288, 721 P.2d 950 (1986). The Port/BNSF claim in their brief at 22 that it is a question of law, citing *King County*, 133 Wn.2d at 592, 597-601. *Nowhere* in the cited pages of the opinion did this Court say what the Port/BNSF claim. Rather, on undisputed facts, the Court concluded that the consideration received by the district there from the Seattle Mariners was grossly inadequate. Factual issues abound here as to the Port's actual donative intent or its donative intent as discerned from the grossly inadequate consideration it received from BNSF for track usage.

of the tracks at issue here in perpetuity. Br. of Resp'ts at 22-25. The Port *intended* to make this gift to BNSF. Br. of Appellants at 23-25.

Moreover, even if that donative intent is measured by assessing whether the consideration the Port receives from BNSF is “grossly inadequate,” the Port/BNSF are not exactly forthcoming in their treatment of the inadequacy of the consideration the Port receives from BNSF for track usage. As noted *supra*, they intentionally blur the lines between the consideration given between the federal government and the railroads in 1947 for perpetual rent-free track usage with the “consideration” the Port received *from DOE* for the receipt of federal surplus property. In their brief at 21, they do not dispute the expert testimony adduced by Peterson that articulates the dollar value of the BNSF’s rent-free utilization of the Port’s tracks. Br. of Appellants at 27-30. Simply put, BNSF (and now UP) will have the rent-free use of the Port’s tracks at issue here into the indefinite future. They will cause substantial wear and tear to those tracks that the Port’s taxpayers will be forced to address. The “consideration” for the Port/BNSF deal was grossly inadequate. *See generally*, Br. of Appellants at 25-35.

The only means of compensating for such grossly inadequate consideration is for the Port/BNSF to assert that the Port receives the intangible benefit of “economic development,” but the Port/BNSF are also

less than clear, or candid, as to the importance of “economic development” in the consideration, or lack thereof, that the Port receives from BNSF for article VIII, § 7 purposes. The Port/BNSF do not specifically state that economic development must be included in any article VIII, § 7 calculation of grossly inadequate consideration, but they frequently reference economic development in their brief. *E.g.*, Br. of Resp’ts at 8, 10, 23, 25, 27. In fact, they do not, and cannot, cite a single case arising under article VIII §§ 5 or 7 that holds that a government may substitute the intangible benefit of “economic development,” however that is defined or measured, for tangible consideration like rental payments.¹¹ This Court has seemingly rejected intangible benefits as consideration in *Port of Longview v. Taxpayers of Port of Longview*, 85 Wn.2d 216, 527 P.2d 263, 533 P.2d 128 (1975) and *Lassila v. City of Wenatchee*, 89 Wn.2d 804, 576 P.2d 54 (1978). This Court should again squarely reject the Port/BNSF implied argument, peppered throughout their brief, that “economic development” may substitute for tangible consideration in measuring donative intent under article VIII, § 7.

In sum, the trial court erred in determining as a matter of law that the Port did not intent a gift of its tracks to BNSF under these facts.

¹¹ The Port/BNSF have *no answer* to Peterson’s discussion of how “economic development” has been abused in private-public dealings. Br. of Appellants at 33 n.36.

(c) There Was Inadequate Legal Consideration for the Port/BNSF Deal

The Port/BNSF contend in their brief at 18-22 that Peterson never challenged the legal sufficiency of the consideration the Port received from BNSF and that the consideration received was, in fact, legally sufficient. It is wrong on both contentions. Br. of Appellants at 35.

.....

The trial court erred in granting summary judgment to the Port/BNSF on article VIII, § 7.

(2) The Port/BNSF Deal Is Governmental Favoritism Violating Article I, § 12

The Port/BNSF are dismissive of Peterson’s article I, § 12 argument on two grounds. They contend the constitutional restriction on favoritism toward a private entity by government cannot be present if the favoritism is manifested in a contract, rather than a law. They also contend that a “fundamental right” is not at issue here. Br. of Resp’ts at 28-32. Their first argument would create a *gaping* hole in the mandate of article I, § 12. Their second argument is not supported in law or on these facts. Both should be rejected by this Court.¹²

¹² It is important to note that the Port/BNSF do not dispute the facts that the Port allowed such a rent-free deal for Port property to no other Port tenant or that it had no policy or protocol establishing a procedure by which a tenant could seek such a deal. Br. of Appellants at 7-8. Their putative “explanation,” br. of resp’ts at 25, for the Port’s failure to report this troubling rent-free gift to BNSF to the State Auditor in 2012 or 2015

First, the contention that the constitutional restrictions on favoritism require such favoritism to be expressed in a “law” makes no sense, given the powerful public policy expressed by the Framers in article I, § 12. *Ockletree v. Franciscan Health Sys.*, 179 Wn.2d 769, 775, 317 P.3d 1009 (2014). The Port/BNSF have *no answer* to the fact that this interpretation would effectively immunize all special purpose units of government, like the Port, from article I, § 12, as their decisionmakers do not enact “laws.” Br. of Appellants at 40-42. Also, more general purpose units of government like the State itself, or cities and counties, would be free to engage in blatant favoritism toward private entities so long as that favoritism did not result from the enactment of a statute or ordinance.

Constitutional interpretation should avoid an unreasonable result.¹³ The interpretation of article I, § 12 advocated by the Port/BNSF as to article I, § 12 enshrines an unreasonable restriction on the constitutional anti-favoritism policy of that provision; this Court should reject it.

Specifically, the Port/BNSF have no real answer to the point in Peterson’s opening brief at 40-41 that article I, § 12 applies to a Port

audits, CP 440-41, is remarkable for the Port’s contention that it has no lease with BNSF. If this rent-free deal was legally acceptable, why did the Port hide it from the State Auditor?

¹³ As stated in *Washington Water Jet Workers Ass’n v. Yarbrough*, 151 Wn.2d 470, 477, 90 P.3d 42 (2004), this Court gives the language of the Constitution a reasonable interpretation, employing its common and ordinary meaning at the time it was drafted. The Court also looks to the historical context of the provision.

decision approved by resolution as such a resolution of the Port's commissioners has the force of law. RCW 53.12.295. When the Framers employed the word "law" in article I, § 12 they were aware that municipal corporations other than cities and counties would be created by the Legislature. Wash. Const., art. XI, § 10.¹⁴ They knew that the acts of district decisionmakers would carry the force of law.

Here, the Port did adopt the Indenture by resolution, as it *essentially* admits. Br. of Resp'ts at 29. Article I, § 12 applied.

Further, the Port/BNSF's contention that a fundamental right is not at stake here, br. of resp'ts at 30-32,¹⁵ is equally unavailing to them. Citing *Ventenbergs v. City of Seattle*, 163 Wn.2d 92, 178 P.3d 960 (2008),¹⁶ the Port/BNSF claim that only *certain* fundamental rights are protected by article I, § 12. But they have *no answer* to this Court's broad description of fundamental rights in *State v. Vance*, 29 Wash. 435, 438, 70 Pac. 34 (1902) that specifically references "the right to be exempt, in property or persons, from taxes or burdens which the property or persons of citizens of some other state are exempted from." Similarly, they fail to

¹⁴ Indeed, the Legislature created irrigation districts in the first legislative session in 1889. RCW 87.03.010. Diking, drainage, and flood control district soon followed in 1895. RCW 85.05.010; RCW 87.03.005.

¹⁵ The trial court did not reach this question.

¹⁶ Contrary to the claim by the Port/BNSF in their brief at 30-31, citing page 10 of this Court's opinion in *Ventenbergs*, the Court there did not confine the reach of article I, § 12 merely to the right to vote, to acquire and hold property, or to litigate in court.

address other cases on article I, § 12 evidencing a broad understanding of fundamental rights. Br. of Appellants at 39 n.38.

Simply put, Port taxpayers have a fundamental right to expect that businesses like the BNSF will pay for their use of public facilities. The Port/BNSF violated article I, § 12 in their perpetual, rent-free sweetheart deal for BNSF usage of valuable publicly-owned facilities.

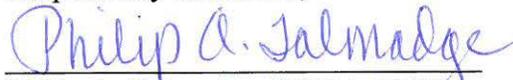
D. CONCLUSION

The Port/BNSF cannot support the obvious gift of public facilities and illicit government favoritism toward BNSF that its use of the Port tracks rent-free in perpetuity represents. This is precisely what the Framers intended to prevent in adopting article VIII, § 7 and article I, § 12 of our Constitution.

This Court should reverse the trial court's order on summary judgment. As noted *supra*, at a minimum, there was a question of fact regarding the Port's donative intent and the grossly inadequate consideration received by the Port for BNSF's rent-free track usage. This Court could also rule as a matter of law on these facts that the Port violated article VIII, § 7 and article I, § 12. Costs on appeal should be awarded to Peterson.

DATED this 14th day of December, 2017.

Respectfully submitted,



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APPENDIX

Wash. Const. art. I, § 12:

No law shall be passed granting to any citizen, class of citizens, or corporation other than municipal, privileges or immunities which upon the same terms shall not equally belong to all citizens, or corporations.

Wash. Const. art. VIII, § 7:

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

DECLARATION OF SERVICE

On said day below, I electronically served a true and accurate copy of the *Reply Brief of Appellants* in Supreme Court Cause No. 94588-8 to the following parties:

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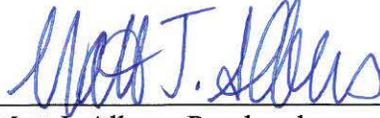
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I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: December 14, 2017 at Seattle, Washington.



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