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No. ~~00007-2~~

WASHINGTON STATE SUPREME COURT

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

Appellant,

v.

KING COUNTY,

Respondent.

FILED

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I. INTRODUCTION

The Brief of Respondent King County Metro contains numerous fatal errors and omissions. First, by failing to even mention the standard of review, let alone apply it properly, the County has built its arguments on “facts” that are contrary to evidence in the record. Second, the County’s brief is a classic example of missing the forest for the trees. The County spends page after page on 100 years of irrelevant historical minutiae while largely losing sight of the significant issues presented by this appeal. Instead of focusing on the issues whether Metro took or damaged Evergreen’s CPCN or whether Metro violated RCW 35.58.240 by replicating Evergreen’s service, the County flouts established Washington law by arguing that Evergreen does not have exclusive rights and that a CPCN is not property. Finally, the County’s brief is riddled with errors and misstatements of the law and authorities on which it relies.

The County’s errors and omissions leave the Court with but one conclusion: the County’s Metro Route 194 operations have taken or damaged Evergreen’s CPCN—a valuable property right—and have violated RCW 35.58.240.

II. ARGUMENT

A. The County improperly ignores the applicable standard of review.

This case seeks review of two orders granting dismissal on summary judgment. Thus, the standard of review is de novo—requiring the Court to view all facts and accord all inferences in a light most favorable to Evergreen, the nonmoving party below.¹ In ignoring the standard of review, the County has improperly based a number of its key arguments on facts that are contradicted by the record.

B. The County has failed to show that it has neither damaged Evergreen's property nor taken it.

1. In duplicating Evergreen's Airporter service, the County has taken a valuable property right.

The County's fundamental mistake is that its inverse condemnation analysis is based on a faulty premise—that Evergreen's CPCN is not a legally cognizable property right.² Property interests are not created by the constitution, but are reasonable expectations of entitlement derived

¹ E.g., *Lunsford v. Saberhagen Holdings, Inc.*, 166 Wn.2d 264, 270-71, 208 P.3d 1092 (2009).

² Brief of Respondent at 36.

from independent sources such as state law.³ But the County ignores cases that are directly on point, providing only irrelevant and factually dissimilar authority.

a. Evergreen's CPCN *is* property.

At least two statutes recognize that Evergreen's CPCN is property.

First, RCW 81.68.040 gives CPCNs all the attributes of property such as the right of possession, use, and disposition:

Any right, privilege, certificate held, owned, or obtained by an auto transportation [(bus)] company may be sold, assigned, leased, transferred, or inherited as other property, only if authorized by the commission.⁴

Under the clear wording of RCW 81.68.040, a CPCN can be held and owned (possessed and used), and sold, assigned, leased, transferred, or inherited (disposed of). These are the fundamental attributes of property.⁵

Second, RCW 35.58.240 gives Evergreen the remedy of ***compensation*** if the County is required to purchase or condemn its CPCN. This statutory requirement that the County compensate Evergreen for its

³ *Bd. of Regents v. Roth*, 408 U.S. 564, 577, 92 S. Ct. 2701, 33 L. Ed. 2d 548 (1972).

⁴ RCW 81.68.040 (emphasis added).

⁵ *Guimont v. Clarke*, 121 Wn.2d 586, 854 P.2d 1 (1993) (stating that under the threshold inquiry, the court first asks whether the regulation destroys or derogates any fundamental attribute of property ownership, including the right to possess, exclude others, and dispose of the property). *See also* AGO 1980 No. 014, at 5-6.

CPCN underscores the fact that the CPCN *is* property.⁶

The County attempts to trivialize Evergreen's CPCN property right by recharacterizing it as a business expectancy, a collateral interest, or a privilege. In doing so, the County ignores the statutes and cases directly on point cited by Evergreen and the Attorney General, and instead cites cases that are tangential or irrelevant to CPCN rights. For instance, in *Mitchell Arms, Inc. v. United States*, 7 F.3d 212, 215 (Fed. Cir. 1993), *cert. denied*, 511 U.S. 1106 (1994), a federal court characterized the plaintiff's *reliance* on a federal firearm import permit as not being protectable property.⁷ The County fails to state how a federal interpretation of a right stemming from a federal permit should have any bearing here when the Washington Legislature and courts have repeatedly and expressly characterized Evergreen's CPCN as a property right.

Just as irrelevant is *Clear Channel Outdoor v. Seattle Popular Monorail Authority*, 136 Wn. App. 782, 150 P.3d 649, *rev. denied*, 161 Wn.2d 1027 (2007), in which the Court of Appeals held nothing more than

⁶ *See, e.g.*, AGO 1980 No. 014, at 4 (recognizing that RCW 35.58.240 indicated a legislative intent to protect property rights in a CPCN, even though it did not apply directly).

⁷ The permit itself was not even an issue in *Mitchell Arms*, making it even less relevant here.

a month-to-month tenancy is not a property interest subject to condemnation because it is not a permanent interest.⁸ In contrast, Evergreen's CPCN is of indefinite duration and subject to cancellation only for cause.⁹

Finally, the County cites *Granite Beach Holdings, LLC v. State DNR*, 103 Wn. App. 186, 11 P.3d 847 (2000), in which the Court of Appeals held that the state's refusal to grant an easement for access to a particular plot of land could not support an inverse condemnation claim, since no right to such access existed. In contrast, as stated above, Washington recognizes that Evergreen's CPCN is a valid property right.¹⁰ Moreover, the *Granite Beach* decision is based on real estate law regarding easements and has no bearing here.

The County either misunderstands or misconstrues the property that Evergreen claims was damaged or taken. Evergreen does not claim a property right in higher profits and business valuation. The County has

⁸ 136 Wn. App. at 784-85. Similarly, the facts of *Litz v. Pierce County*, 44 Wn. App. 674, 679, 723 P.2d 475 (1986), are equally irrelevant on its facts. In that case, the court ruled that since a ferry schedule does not "attach" to the land, it is not a property right that can be taken or damaged so as to support an action for inverse condemnation.

⁹ See WAC 480-30-171; see also *Lee & Eastes, Inc. v. Pub. Serv. Comm'n*, 52 Wn.2d 701, 704, 328 P.2d 700 (1958).

¹⁰ RCW 35.58.240, 81.68.040.

partially taken or damaged a CPCN, an intangible property right created by state law. The CPCN gives Evergreen the right to bus airline passengers between Sea-Tac and Seattle free of the County's duplicative, publicly subsidized bus service. The lost profits and diminished value of the CPCN are merely the damages suffered because of the County's taking. This is a distinction lost on the County, but a distinction fully realized in the law.

- b. Evergreen's CPCN grants it exclusivity, which constitutes a valuable property right.

Apparently fearing that the Court will see through the fallacies of its arguments that Evergreen's CPCN is not protectable property, the County further argues that a CPCN grants "no monopoly" rights. To make this argument, the County must: (1) ignore the bus statute that grants exclusive rights to holders of bus CPCNs; (2) rely on cases that involved completely different statutory schemes; and (3) misstate the holdings of cases regarding exclusive CPCN rights.

First, contrary to the County's arguments, Evergreen's exclusive CPCN rights to provide Airporter service from SeaTac to Seattle were granted by the Legislature, not the WUTC:

The commission may [issue a certificate] when the applicant

requests a certificate to operate in a territory already served by a certificate holder under this chapter, only when the existing auto transportation company or companies serving such territory will not provide the same to the satisfaction of the commission

RCW 81.68.040 (emphasis added). Tellingly, the County ignores the statute and instead argues that Evergreen's CPCN cannot grant exclusive rights because it does not contain the word "exclusive, sole, only, or monopoly." This argument is disingenuous, at best, given the statute's grant of quasi-exclusive rights.

Apart from ignoring this plain statutory language, the County fails to even mention this Court's numerous decisions that recognize the exclusive property rights of CPCN holders under RCW 81.68.040 as well as other chapters in RCW Title 81. For example, in *Horluck Transportation Co. v. Eckright*, 56 Wn.2d 218, 352 P.2d 205 (1960), this Court held that a bus CPCN is a property right and that interference with the right of exclusivity is actionable:

"[T]he plaintiff has a franchise granted it by the sovereign power authorizing it to carry passengers for hire This franchise is property, and any unlawful interference therewith is actionable. It . . . is exclusive against any one who assumes to exercise the privilege of carrying passengers in the absence of authority or in defiance of the laws regulating the privilege. To

do so is unlawful”¹¹

Additionally, the same protection, that others “will not provide service to the satisfaction of the [WUTC],” applies to holders of solid waste (garbage) CPCNs as well.¹² Under the language nearly identical to that in RCW 81.68.040, this Court has recently recognized the exclusivity and property right inherent in garbage CPCNs. In *Dahl-Smyth, Inc. v. Walla Walla*, 148 Wn.2d 835, 64 P.3d 15 (2003), this Court and the lower courts all accepted without question the valuable property right that exclusivity provides to solid waste haulers. For example:

After a bench trial, the court ruled that [Dahl-Smyth’s] certificate was a property right that has value distinct from lost profit and awarded [damages]. . . .

. . . . The Court of Appeals accepted Dahl-Smyth’s proposition that the hauler’s certificate is a property right and that damages for cancellation by annexation are governed solely by RCW 35A.14.900.¹³

¹¹ 56 Wn.2d at 222-23 (emphasis added) (quoting *Puget Sound Traction Light & Power Co. v. Grassmeyer*, 102 Wash. 482, 490, 173 P. 504 (1918)); see also, *State Dep’t Pub. Works v. Inland Forwarding Corp.*, 164 Wash. 412, 418-19, 2 P.2d 888 (1931); *Inter City Auto Stage Co. v. Bothell Bus Co.*, 139 Wash. 674, 690-91, 247 P. 1040 (1926).

¹² RCW 81.77.040.

¹³ 148 Wn.2d at 839-40; see also, *Ventenbergs v. City of Seattle*, 163 Wn.2d 92, 178 P.3d 960 (2008). Although the exclusivity in *Ventenbergs* was created by contracts with the City of Seattle, the Court implicitly acknowledged the exclusivity that the certificate holders had obtained under RCW 81.77.040 before they entered the contracts: “Rabanco (FOOTNOTE CONT’D)

The County, ignoring cases under the bus statute and statutes with parallel provisions, relies on telephone and motor freight cases, which were decided under statutes that lack exclusivity language. In *In re Electric Lightwave, Inc.*, 123 Wn.2d 530, 869 P.2d 1045 (1994), the Court merely held that RCW 80.36.230 does not contain a grant of exclusivity. This Court implicitly agreed with the dissent of the WUTC Chairman in that case, who clearly explained the statutory distinctions:

In [the *Inland Forwarding*] case, the court upheld the Commission's grant of 'quasi-exclusive' franchises to auto transportation companies under a statute that explicitly established a monopoly structure. See RCW 81.68.040. . . . Similar language is contained in RCW 81.77.040 In both cases, the Legislature sought to create a 'quasi-exclusive' franchise, and used clear, explicit language to do so.

The wording differences between RCW 80.36.230 and these other explicitly monopolistic statutes are important¹⁴

The County next cites two cases involving motor freight carriers,¹⁵

and Waste Management gained the exclusive rights to collect commercial waste within Seattle." 163 Wn.2d at 97.

¹⁴ *In re Application of Electric Lightwave, Inc.*, No. UT-901029, 1991 Wash. UTC LEXIS 115 at *39-40 (Wash. UTC Dec. 6, 1991) (emphasis added). The County's implicit argument based on *In re Electric Lightwave* and Article XII, Section 22 of the Washington State Constitution—that the Legislature cannot create quasi-exclusive rights under a comprehensive regulatory scheme to promote the general welfare—is contrary to established Washington law. See e.g., *Ins. Co. of N. Am. v. Kueckelhan*, 70 Wn.2d 822, 839, 425 P.2d 669 (1967).

¹⁵ Brief of Respondent at 34-35.

which were regulated under RCW Chapter 81.80 until it was largely pre-empted by federal law. As the court noted in one of those cases, *Black Ball Freight Serv. v. Wash. Util. & Transp. Comm'n*, 77 Wn.2d 479, 463 P.2d 169 (1969), the motor freight carrier statute expressly denied CPCN exclusivity:

“Nothing contained in this chapter shall be construed to confer upon any person or persons the exclusive right or privilege of transporting property for compensation over the public highways of the state.”¹⁶

The exclusivity language of the bus and garbage statutes was nowhere to be found in RCW Chapter 81.80.

Finally, the County misstates the holding of *State ex rel. Puget Sound Navigation Co. v. Dep't of Pub. Works*, 165 Wash. 444, 452, 6 P.2d 55 (1931), as being that a “certificate of public convenience and necessity for ferry service does not confer a monopoly.” To the contrary, in that case the Court *acknowledged* the exclusive rights granted under the ferry statute (again parallel to the bus and garbage statutes), “unless the existing certificate holder has failed or refused to furnish reasonable and adequate

¹⁶ 77 Wn.2d at 484 n.7 (emphasis added) (quoting RCW 81.80.070).

service.”¹⁷ The case turned not on the *existence* of exclusive rights—which were presumed—but rather on whether the territories overlapped—a question of fact:

“The question, what is territory already served, is a question of fact. Before that fact can be determined, it requires consideration of economic conditions, oftimes involving expert testimony”¹⁸

The record in this case includes such expert testimony, from a former WUTC law judge, that Metro’s 194 service unquestionably overlaps Evergreen’s Airporter CPCN.¹⁹

- c. Incremental and increasing governmental actions over time have directly or proximately cause damage to Evergreen’s intangible property.

Not only does the County mistakenly assume that Evergreen has no compensable property right, it also erroneously argues that Metro’s operation of Route 194 did not proximately cause Evergreen’s loss of property. This argument is contradicted by the undisputed facts of record. Moreover, the County’s legal arguments are erroneous or irrelevant—most

¹⁷ RCW 81.84.020.

¹⁸ 165 Wash. at 452 (quoting *Puget Sound Nav. Co. v. Dep’t of Pub. Works*, 152 Wash. 417, 278 P. 189 (1929)).

¹⁹ CP 1496-98; *see also* CP 168-70 (RP 43-45).

of the cases the County cites do not even discuss proximate cause, and the few cases that do are readily distinguishable.

It is difficult to respond to the County's arguments, primarily because it completely misses the point that this case involves *intangible*, not real or tangible personal, property. Thus, it is nonsensical for the County to argue that there was no proximate cause because it did not "physically invade or occupy Evergreen's property." It is impossible to "physically invade" intangible property.

Because Washington law does give Evergreen exclusive rights under its CPCN, the case of *Delmarva Power & Light Co. v. City of Seaford*, 575 A.2d 1089 (Del. 1990), in which the court upheld an action for inverse condemnation, is directly on point. Moreover, although the present case is one of first impression in Washington, there is a long line of analogous precedent in this state, in which courts have held that property owners may prove a taking claim by showing a measurable and provable decline of market value. These cases include *Ackerman v. Port of Seattle*,²⁰ *Martin v. Port of Seattle*,²¹ and *Highline Sch. Dist. No. 401 v.*

²⁰ 55 Wn.2d 400, 348 P.2d 664 (1960).

²¹ 64 Wn.2d 309, 391 P.2d 540 (1964).

Port of Seattle,²² which the County fails to distinguish or even *mention*.

Instead of addressing the most relevant cases, the County cites *Pierce v. Northeast Lake Washington Sewer & Water Dist.*, 123 Wn.2d 550, 870 P.2d 305 (1994). The *Pierce* opinion does not even contain the word “proximate” and merely stands for the unremarkable proposition that an inverse condemnation claim cannot be based only on the aesthetic appearances of a structure lawfully constructed on an adjacent property.²³

Likewise, the County’s case of *Aubol v. City of Tacoma*, 167 Wash. 442, 9 P.2d 780 (1932), does not mention “proximate cause.” In *Aubol*, the Court stated that the plaintiffs’ *apprehension* of future harm was insufficient to show a damaging or taking. In the present case, undisputed facts show that the County has *actually* harmed Evergreen.²⁴

Finally, the Court in *Conger v. Pierce County*, 116 Wash. 27, 198 P. 377 (1921), did not address proximate cause and, moreover, allowed the property owner to seek damages caused by the defendants’ lawful exercise

²² 87 Wn.2d 6, 548 P.2d 1085 (1976).

²³ 123 Wn.2d at 560.

²⁴ Moreover, the proposition that depreciation of market value of property is insufficient to prove an inverse condemnation claim has not been the law in Washington for many decades. *Aubol* has been implicitly overruled by numerous cases holding that a plaintiff may prove a takings claim by showing a measurable and provable decline of market value. See, e.g., *Highline Sch. Dist.*, 87 Wn.2d at 13.

of the police power. If *Conger* has any relevance to the present case, it supports Evergreen's claim. There, the Court held that a legislative enactment did not shield the governmental authority from claims for losses suffered by private property owners.²⁵ Similarly, the County is not permitted to damage private property and then claim it is immune from such claims because of its status as a governmental entity.

- d. The County directly or proximately caused damage to Evergreen's property.

Proximate cause consists of two elements: cause in fact and legal causation.²⁶ As a factual matter, treating all of Evergreen's evidence and reasonable inferences therefrom as true, there is no question that the County's unlawful taking or damaging of Evergreen's CPCN right to provide the exclusive bus service to airline passengers between Sea-Tac and Seattle was the direct and proximate cause of Evergreen's damages. Evergreen presented uncontested expert testimony that Metro Route 194 siphons off a substantial and ever-increasing number of Evergreen's

²⁵ 116 Wash. at 38. The County cites *Conger* for a statement the Court made in dicta—that private property owners cannot claim incidental or consequential damages. But that dictum is irrelevant here. Moreover, it is questionable whether the examples given in this nearly 90-year-old case would still be true under modern authorities.

²⁶ *E.g., Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985).

Airporter passengers. For example, Evergreen's expert stated:

It is my opinion, based on the Evergreen and Metro documents that I have reviewed as well as my extensive experience in the bus industry for several decades that unquestionably Metro by operating, marketing, and repeatedly improving Route 194 service has significantly damaged Evergreen's Airporter service by siphoning off airline passengers who would otherwise have ridden the Evergreen Airporter.²⁷

Moreover, Evergreen presented actual Route 194 passenger survey data establishing that 38 percent or more of Metro's 194 riders would have taken the Evergreen Airporter if it were not for the County's violation of Evergreen's rights of exclusivity.²⁸

2. The County completely failed to address the issue whether the Washington Constitution is more protective of private property rights than the federal constitution.

Assuming, for sake of argument only, that the County is correct that there can be a compensable *taking* only when there is physical invasion of land or when it regulates Evergreen's bus operation as to destroys a fundamental attribute of property, then the distinction between "taking" and "damaging" becomes all the more important. Under Article 1, Section 16, of the Washington Constitution, private property cannot be

²⁷ CP 176.

²⁸ *Id.*; see also CP 73-137, 175-85, 1611-25.

taken *or damaged* without just compensation. This Court has not conclusively determined whether, in the inverse condemnation context, there is a difference between “damaging” and “taking” under the Washington Constitution. For instance, in *Martin*, this Court explained:

We are substantially in agreement with the trial court. However, this court will not in this case stress any of the proposed distinctions between the “taking” and the “damaging” of a property right respecting the use and enjoyment of the land. As the Washington Constitution affords or provides a basis for compensation in either instance, subtle efforts at legal refinement to characterize and describe a particular interference can be expected to be more difficult and treacherous than convincing or utilitarian.²⁹

The *Martin* Court may have been right when it stated that there may be little utility in distinguishing between “taking” and “damaging” in an inverse condemnation case. The distinction is useless because, under well-settled Washington precedent, including *Martin* and its progeny, courts have repeatedly ruled that the interference with the use and enjoyment of property resulting in a measurable loss of market value can be compensable under a claim of inverse condemnation, most notably in

²⁹ 64 Wn.2d at 313.

the trio of cases involving the Port of Seattle discussed above.³⁰

Even if the Court is guided by federal takings jurisprudence on whether an uncompensated taking occurred, the Court of Appeals in *Manufactured Housing Communities v. State*, 90 Wn. App. 257, 951 P.2d 1142 (1998), recognized that the evolution of federal takings claims shows an increasing merging of the concepts of “taking” and “damaging”:

Early Washington case law literally interprets taking or damaging property to involve physical occupation or degradation. As the United States Supreme Court has expanded the protections afforded by the federal takings clause, the distinction between taking and damaging property has become murky; the Washington State Supreme Court finally decided to “abandon[] the ‘difficult and treacherous’ distinction between” the two.³¹

It is not clear whether the Washington Supreme Court has firmly abandoned making a distinction between “taking” and “damaging” given footnote 8 in its opinion in *Manufactured Housing Communities v. State*.³² To the extent that there is a difference, the Washington Constitution

³⁰ *Ackerman v. Port of Seattle*, 55 Wn.2d 400; *Martin v. Port of Seattle*, 64 Wn.2d 309; *Highline Sch. Dist. No. 401 v. Port of Seattle*, 87 Wn.2d 6.

³¹ 90 Wn. App. at 264 (citations omitted).

³² 142 Wn.2d 347, 357 n.8, 13 P.3d 183 (2000) (“While the Park Owners claim the addition of the word ‘damaged’ in article I, section 16 provides greater protections against government takings than the Fifth Amendment, resolving this issue is unnecessary for the disposition of this case.”).

clearly allows for compensation when government conduct interferes with the use and enjoyment of private property resulting in a substantial decline in market value based on established precedent.³³

C. **The County violated RCW 35.58.240 by extending its transportation function into the same service and area as Evergreen's Airporter.**

The County's argument that it did not "extend" its transportation function into the area or service of Evergreen relies on several fundamental errors in interpretation of RCW 35.58.240 and other laws. Moreover, the County's analysis disregards the factual record. The County violated RCW 35.58.240 if it extended into either the same service "or" area as Evergreen. In this case, it has done both.

1. Metro Route 194 covers the same area and service as Evergreen's Airporter.

The County's arguments ignore both the nature of the exclusivity set forth in the bus CPCN statute, RCW 81.68.040 and the language contained in Evergreen's CPCN. The exclusivity the statute provides is to operate "in a territory" specified by the CPCN.³⁴ The statute says nothing

³³ See e.g., *Martin*, 64 Wn.2d at 318.

³⁴ RCW 81.68.040.

about such minor distinctions as the comfort of the seats, the height of the bus, the number of turns made, or where luggage is stowed. The County does not cite any authority that the WUTC itself makes such fine distinctions, because no such authority exists.

Mr. Wallis, Evergreen's WUTC expert, debunked the County's attempts to distinguish its service from Evergreen's Airporter explaining why, based on his decades of experience in writing bus orders at the WUTC, the WUTC would ignore such distinctions when deciding whether a territory is already satisfactorily served.³⁵

Looking at Evergreen's CPCN itself, it describes a service geared to airline passengers and crew members, rather than commuters served by Metro's historical transit bus operations. Additionally, Evergreen's CPCN permits it to provide direct service that does not compete with "milk run" transit services that make numerous stops between Sea-Tac and downtown Seattle.³⁶ In contrast to the County's irrelevant facts, nothing in the CPCN is about baggage handling and stowage, the type of motor coach used, or

³⁵ CP 251-53, 266-72. Mr. Wallis also explained why the operations of Shuttle Express are not relevant to this case. CP 259-60, 274-76. In fact, Evergreen's Airporter is the only regularly scheduled bus service between Sea-Tac Airport and Seattle, except for Metro's buses. CP 260.

³⁶ CP 258-60, 264-66, 1240, 1274-75, 1582-98.

the method of ticket sales.

The County's focus on minutiae ignores the forest for the trees.³⁷ The Court should not be similarly distracted from the big picture, which is that, as a consequence of the County's duplication of Evergreen's Airporter, every year hundreds of thousands of passengers who would otherwise have ridden the Airporter—but for the County's unlawful taking of the right of exclusivity—instead rode Metro's Route 194.³⁸ The County did not even dispute this fact.

To use the County's own authority, “no construction should be given to a statute which leads to gross injustice or absurdity.”³⁹ It would be absurd for the Legislature to have intended that minor differences in the character of a service or area operated by Metro would permit the County to evade the buyout requirements of RCW 35.58.240 when nearly two-fifths of Metro Route 194 passengers would have ridden Evergreen's Airporter, but for the County's interference. By ignoring real-world behavior of passengers and instead discussing the comfort of the seats,

³⁷ Some of the numerous unimportant and legally irrelevant distinctions between Metro's and Evergreen's services are mentioned above. *See* Brief of Respondent at 13-14, 24.

³⁸ *E.g.*, CP 74, 183, 1242, 1322.

³⁹ *In re Horse Heaven Irrigation Dist.*, 11 Wn.2d 218, 226, 118 P.2d 972 (1941).

Metro might as well argue that it is not providing the same service because its buses are a different color. Such distinctions without a difference are not logically or legally supportable.

The court below found, as an undisputed matter of fact, that the County was operating in the same area and offering the same service as Evergreen's Airporter service, based on an extensive factual record including the testimony of the WUTC expert who concluded:

"I believe that [Metro] offers a service in route 194 that is both within the area of Evergreen Trail's service and it is a service of an expedited nature that I believe competes directly with Evergreen Trails."⁴⁰

Given this fact record and the standard of review, the County cannot seriously challenge that Metro is not currently operating in the same area *and* service as Evergreen.

2. Metro has *extended* transportation into the same area and service as Evergreen.

The County's first error in addressing "extension" is to interpret the purchase requirement of RCW 35.58.240 as a *one-time* obligation by Metro to buy out only the two existing transit companies when it first

⁴⁰ CP 267-68 (emphasis added); *see also* CP 168-70, 176-78, 1579-80.

began operation in 1973.⁴¹ Undoubtedly the Legislature had in mind the immediate need for Metro to compensate the two city bus companies that were providing transit service in the Seattle area, since a takeover of those companies was planned. But RCW 35.58.240 was not limited to the specific transactions in 1973. Rather, the law was open-ended and applied “in the event” of *any* extension to an area or service already offered by *any* existing CPCN holder.⁴² The Legislature wisely foresaw the possibility (which has occurred) that Metro’s service or area would eventually expand beyond those offered by the two transit companies that Metro planned to take over in 1973.

Next, Metro provided no transportation service anywhere before 1973. Thus, Metro must have extended into Evergreen’s area and service, since it now provides an Airporter-equivalent service. Faced with this inescapable logic, the County can only argue that its extension predates Evergreen’s CPCN.⁴³ That argument, as with many others in the County’s brief, is contrary to both the law and fact record in this case. Factually, the

⁴¹ See Brief of Respondent at 41; *see also* CP 339.

⁴² See RCW 35.58.240.

⁴³ Brief of Respondent at 43.

County's assertion that Evergreen did not "enter" into service until 1984 ignores undisputed evidence that Evergreen purchased all the rights in CPCN No. C-849 from Western Tours.⁴⁴ The County's own brief establishes that those rights date back to 1965—eight years before Metro commenced operations.⁴⁵ The legal flaw undermining the County's argument is that, under common carrier law, the rights of a purchaser of a CPCN relate back to the original grant of the CPCN.⁴⁶ Thus, Evergreen's priority over the County's extension relates back to 1965, well before Metro ever "extended its transportation function" anywhere.

But on the record in the case, the Court need not look back to 1973 because "Metro did not substantially compete with Evergreen's Airporter service in 1985 or for many years after that."⁴⁷ The reason is obvious. Metro's historical milk run service, Route 174, makes over 35 stops

⁴⁴ CP 348, 1240, 1577-78, 1582-84.

⁴⁵ Brief of Respondent at 20.

⁴⁶ *E.g., In re Buchmann Sanitary Serv., Inc.*, Nos. GA-78433, GA-78444, 1996 Wash. UTC LEXIS 2, at *21 (Wash. UTC Mar. 5, 1996) ("[A CPCN transferee] inherits a service history, that of the transferor."). *See also, Miller v. Anderson*, 91 Wn. App. 822, 964 P.2d 365 (1998), *rev. denied*, 137 Wn.2d 1028 (1999) (ten year period required for adverse possession may be shown by tacking a predecessor's adverse use if privity exists between the current and previous owner, and the owners have held continuously and adversely to the title holder).

⁴⁷ CP 1578; *see also* CP 1240.

between the airport and Seattle, while the current Route 194 makes fewer than 5 stops.⁴⁸ Thus, taking all of Evergreen's evidence as true, Metro extended into the area and service of Evergreen not in 1973 or 1985, but rather at some indeterminate time after 1985. The precise moment of the extension is not important in finding that the County violated RCW 35.58.240 and is therefore liable for damages.⁴⁹

Evergreen has argued that 2003 was a watershed year.⁵⁰ At that time, due to several key changes to Metro's Route 194, the County fully duplicated Evergreen's Airporter.⁵¹ Indeed, it may now be even an arguably better service, owing to the taxpayer subsidy.⁵² After the 2003 changes to Route 194, Metro captured a large and increasing share of

⁴⁸ CP 1508; *see also* CP 168-170 (RP 43-45).

⁴⁹ Nor is the statute of limitations a possible issue, because the Superior Court dismissed the County's limitations and laches defenses. CP 1458-59. Since the County did not cross-appeal that dismissal, it is law of the case and may not be challenged in this appeal. *See Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 11 P.3d 762 (2000).

⁵⁰ *See, e.g.*, CP 1262, 1286, 1322, 1267-69, 1531-44.

⁵¹ *See, e.g.*, CP 168-169 (RP 43-44).

⁵² For example, as the County admits, it **doubled** the frequency of its service during peak times from every 30 minutes to every 15 minutes. Brief of Respondent at 14-15; *see also* CP 1163-95. This meant it could now offer substantially faster overall travel times than Evergreen, since the average wait time for the next Metro bus was cut in half. The County's characterization of this change as "minor" improperly seeks inferences in its favor. Brief of Respondent at 14. The County even goes so far as to mischaracterize the 2003 changes as a "contraction" of service, but that referred not to service to Seattle, but rather service to Federal Way—an area irrelevant to this case. *Id.* at 44.

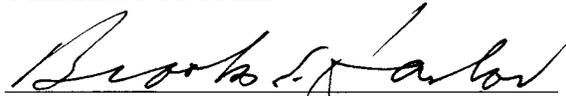
Evergreen's passengers.⁵³ Under the applicable standard of review, the only reasonable inference is that Metro's changes to Route 194 in 2003 caused that substantial diversion of Evergreen's Airporter passengers.

III. CONCLUSION

Based on undisputed evidence of record, the County has taken or damaged Evergreen's valuable CPCN rights without compensation, triggering inverse condemnation rights and a claim for damages under RCW 35.58.240. At the very least, Evergreen has established claims when the evidence and inferences therefrom are viewed most favorably to Evergreen. The Court should reverse the judgment of dismissal and remand to the trial court with directions to enter judgment in favor of Evergreen on liability and proceed to trial on damages only.

DATED this 13th day of October, 2009.

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⁵³ *E.g.*, CP 175-78, 180-85, 1239-40, 1300-02, 1322.

I hereby certify that I served the foregoing APPELLANT'S

REPLY BRIEF on:

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by the following indicated method or methods:

- by **mailing** full, true, and correct copies thereof in a sealed, first-class postage-prepaid envelope, addressed to the attorneys as shown above, the last-known office addresses of the attorneys, and deposited with the United States Postal Service at Seattle, Washington, on the date set forth below.
- by **hand delivering** full, true, and correct copies thereof to the attorneys at their last known address as shown above on the date set forth below.

The undersigned hereby declares, under the penalty of perjury, that the foregoing statements are true and correct to the best of my knowledge.

Executed at Seattle, Washington, this 13th day of October, 2009.


Carol Munnerlyn, Secretary