

**BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION**

CITY OF KENNEWICK

Petitioner

Docket No. TR-050967

v.

RESPONDENT'S MOTION TO
DISMISS FOR LACK OF
JURISDICTION AND SUPPORTING
BRIEF

PORT OF BENTON and TRI-CITY &
OLYMPIA RAILROAD.

Respondents

I. FACTS.

Respondent Port of Benton ("Port") owns a railroad right-of-way, railbed, tracks, bridges and associated equipment (hereinafter Port "trackage") in Benton County. The Port obtained this trackage from the United States Department of Energy. The Port's trackage and rights of way are leased by the Port to the Tri-City and Olympia Railroad ("TCRR"). The trackage is used by TCRR to provide non-passenger rail service to the Hanford Project of DOE, and for other commercial purposes. The trackage commences as a spur off tracks of the Union Pacific Railroad ("UPRR") in Kennewick.

The north boundary of the Port's trackage is also the boundary between Kennewick and Richland. Accordingly, the Port's trackage is in Kennewick. Kennewick wants to install a street grade crossing across that portion of the Port's trackage in Kennewick, and across the adjacent tracks owned by UPRR, to connect with an existing street in Richland.

Kennewick filed two Petitions with the Commission: Docket No. TR-040664 and Docket No. TR-050967. The Port is named as a Respondent only in TR-050967, but no

service of that Petition on the Port was ever made. (Counsel obtained a copy of the original Petition in TR-050967, which did not name any parties, from Counsel for the UPRR; later, a copy of the amended Petition in TR-050967, which names the Port as a Respondent, was obtained from Counsel for Kennewick.)

In its Petition, Kennewick alleges that it is too expensive to put the crossing either over or under the tracks, and has requested approval of a grade level crossing. Commission approval is required to install a grade level crossing. RC 81.53.030. Kennewick has filed two separate Petitions, now consolidated, against the Port of Benton, TCRR , UPRR and others, apparently. Kennewick ultimately seeks to condemn and acquire a right of passage over the trackage of both TCRR and UPRR to install a grade-level street crossing to connect with an existing street in Richland.. The claims, together with maps and pictures, are attached to the Petition.

The Port moves to dismiss the Petition in Docket No. TR-050967 because it is moot and the Commission lacks jurisdiction to proceed.

II. ISSUE.

Can the Commission authorize Kennewick to acquire a right of passage across the Port's trackage to install a grade-level street crossing?

III. ANSWER. No.

IV. ANALYSIS.

A. Kennewick lacks the statutory authority to acquire property of the Port by eminent domain. RCW 81.53.030 provides a two-step process to allow cities to acquire a right of passage over rights-of-way and tracks of a railroad. The statute requires that the city

petition the Washington Utilities and Transportation Commission (Commission) for authority to acquire and construct a grade level crossing, and when approved, to initiate an action in eminent domain to acquire the property required to do so. This process is set out in RCW 81.53.030 which states in pertinent part:

‘...Whenever ... the municipal authorities of a city ... desire to extend a highway across a railroad at grade, they shall file a written petition with the commission, setting forth the reasons why the crossing cannot be made either above or below grade. Upon receiving the petition the commission shall immediately investigate it, giving at least ten days’ notice to the railroad company and the county or city affected thereby, of the time and place of the investigation, to the end that all parties interested may be present and heard. ... If [the commission] finds that it is not practicable to cross the railroad or highway either above or below grade, the commission shall enter a written order in the cause, either granting or denying the right to construct a grade crossing at the point in question...’.

If the WUTC grants a petition to construct a grade crossing, and it is necessary to take, damage or injuriously affect **private** lands, property or property rights, the city must initiate a condemnation proceeding to acquire the right to take the right of passage. RCW 81.53.180(2). The condemnation proceeding must be brought by the city “...as provided by law for the exercise of the power of eminent domain by such municipality ...”. RCW 81.53.180(2). The right to acquire property by eminent domain granted in this section is limited to “...**private** lands, property or property rights...” [emphasis added]. RCW 81.53.180(2). There is no authority anywhere in this section to condemn public property. A city has no inherent power of eminent domain. *In The Matter of the Petition of the Seattle Popular Monorail Authority*, 155 Wn. 2nd 612, 622, -- P. 3rd – (2005), and cases there cited. A city may exercise the power of eminent domain only if expressly authorized by the legislature, and such statutes must be strictly construed. *Id.*; *Seattle vs. State*, 54 Wn. 2nd 139, 338 P. 2nd 126 (1959). A municipality

cannot condemn the property of another municipality unless expressly authorized by statute. *State ex rel. Cle Elum vs. Kittitas County*, 107 Wash. 326,330 173 Pac. 698 (1919), and numerous cases cited therein. Plainly, RCW 81.53.180(2) does not authorize a city to acquire the public property of another municipal corporation by eminent domain. The Commission cannot authorize Kennewick to acquire the right to cross the Port's trackage; its authority is limited to authorizing a grade level crossing over private property. By statute, the sole authority of the Commission is to authorize a grade level crossing over privately owned tracks. RCW 81.53.180(2).

RCW 8.12.030 governs the exercise of the power of eminent domain by a city. It provides:

“Every city and town and each unclassified city and town within the State of Washington, is hereby authorized and empowered to condemn land and property, including state, county and school lands and property for streets, avenues, alleys, highways, bridges, approaches, culverts, drains, ditches, public squares, public markets, city and town halls, jails and other public buildings, and for the opening and widening, widening and extending, altering and straightening of any street, avenue, alley or highway ...”.

Under this statute, a city has no authority to condemn the property of a Port District, whether for road or other purposes. The city can, under this statute, condemn and acquire the public property of “...state, county, and school lands...” for the specific road purposes street purposes listed in the statute. The crossing sought by Kennewick does not involve “state, county or school lands”, and grade crossings are nowhere cited in the statute is a basis for condemnation. Accordingly, Kennewick has no constitutional or statutory right to acquire property of the Port by eminent domain.

The intent of the legislature is clear. The legislature has not expressly or impliedly authorized Kennewick to acquire any interest in property of the Port for any purpose. In the absence of such authorization, Kennewick cannot proceed. *Seattle Monorail Authority*, supra. at 622.

B. The proceedings herein are moot and the Commission cannot proceed. A case is moot if the tribunal cannot award the remedy sought, *Dioxin/Organochlorine Center et al. vs. Pollution Board*, 131 Wn. 2nd 345, 350, 932 P. 3rd 158 (1997), or if it cannot provide effective relief to the plaintiff, *In Re Cross*, 99 Wn. 2nd 373, 376-77, 662 P. 2nd 828 (1983). Kennewick seeks authority to install a grade level crossing over the tracks owned by the Port. Even if the Commission were to find, after a hearing, that the evidence supports a grade level crossing, it still lacks the jurisdiction to award a right of crossing over the Ports tracks. That right, by the plain procedure set forth in the statutes cited above, must be obtained by Kennewick by eminent domain. In this instance, that procedure is foreclosed by law. No award by the Commission in Docket No. TR-050967 will affect the rights of any party. The case is simply moot and must be dismissed. *Grays Harbor Paper Co. vs. Grays Harbor County et al.*, 74 Wn. 2nd 70, 73, 442 P. 2nd 967 (1968).

RESPECTFULLY SUBMITTED this 7th day of February, 2006.


COWAN MOORE STAM & LUKE, P.S.

By: Thomas A. Cowan
Thomas A. Cowan, WSBA #5079

By: Daryl D. Jonson
Daryl D. Jonson, WSBA #994

I, Kathleen J. DeWitt, certify that I transmitted a copy of the foregoing document via U.S. Mail/ Electronic Mail to all parties hereto or their counsel of record. I certify under penalty of perjury, under the laws of the State of Washington, that the foregoing is true and correct.

Dated: February 7, 2006 at Richland, WA.

By: 
Kathleen J. DeWitt
Paralegal
COWAN MOORE STAM & LUKE, P.S.