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BEFORE THE WASHINGTON STATE
UTILITIES AND TRANSPORTATION COMMISSION

CITY OF KENNEWICK,

Petitioner,

v.

PORT OF BENTON, TRI-CITY AND
OLYMPIC RAILROAD, BNSF RAILWAY,

Respondents.

No. TR-050967

CITY'S MEMORANDUM IN
OPPOSITION TO RESPONDENT'S
MOTION TO DISMISS FOR LACK
OF JURISDICTION

I. RELIEF REQUESTED

The City of Kennewick ("City") asks that the Commission deny the Port of Benton's ("Port") motion to dismiss for lack of jurisdiction. The Commission should proceed to exercise its statutory authority and determine the question of whether it is practicable to cross the railroad either above or below grade in accordance with RCW 81.53.030.

II. FACTS

For purposes of the Port's motion, the City stipulates to the facts as recited. The City adds two points, however. First, the user of the Port's property in question, Tri-City and Olympic Railroad ("TCRR") is a for-profit limited liability company. (Ziobro Affidavit, Exhibit A). Second, it is not certain that once the Commission makes its determination regarding a grade-level crossing pursuant to RCW 81.53.030,

1 condemnation will be necessary. A negotiated outcome is always possible and attempts at
2 negotiation are always required. RCW 8.26.180(3).

3 III. STATEMENT OF ISSUES

4 Does the Commission have jurisdiction to determine whether the City has
5 condemnation authority over a railroad or any other entity, or is the Commission's
6 authority instead limited to determining whether it is practicable to cross the railroad
7 either above or below grade in accordance with RCW 81.53.030?

8 IV. EVIDENCE RELIED ON

9 The City relies on the documents on file in this docket, including the original
10 petition for Commission determination of an at-grade crossing dated June 23, 2005, the
11 amended petition dated January 13, 2006, the Commission's Prehearing Conference
12 Order; Order of Consolidation dated January 19, 2006, and the affidavit of
13 John Ziobro and its Exhibit A, submitted with this memorandum.

14 V. ARGUMENT

15 1. Standard of Review.

16 A party to Commission proceedings may move to dismiss another party's claim or
17 case on the basis that the opposing party fails to state a claim on which the Commission
18 may grant relief. WAC 480-07-380. The Commission will consider the standards
19 applicable to a motion made under CR 12(b)(6) and 12(c) of the Washington Superior
20 Court's Civil Rules on a motion made under this subsection. *Id.* Those standards require
21 that all doubts be resolved in favor of the City – the non-moving party. "Under CR
22 12(b)(6), dismissal is only appropriate if 'it appears beyond doubt that the plaintiff cannot
23 prove any set of facts which would justify recovery.' In undertaking such an analysis, 'a
24 plaintiff's allegations are presumed to be true and a court may consider hypothetical facts
25 not included in the record.'" *Burton v. Lehman*; 153 Wn.2d 416, 422, 103 P.3d 1230

1 (2005), citing *Tenore v. AT & T Wireless Servs.*, 136 Wn.2d. 322, 329-30, 962 P.2d 104
2 (1998).

3 **2. The Port fails to examine the jurisdiction of the Commission.**

4 The Port bases its motion to dismiss on a claim that the City lacks the power to
5 condemn Port property, and therefore any action by the Commission to determine the
6 practicality of grade-level crossing for a new road is futile. The Port argues that by statute
7 the Commission can only grant condemnation authority over private property. Port
8 Motion at 4, citing RCW 83.51.180(2). In essence, the Port argues that the City lacks
9 authority to condemn Port property. Therefore, argues the Port, it is moot to consider
10 whether to grant a permit to cross the Port railroad tracks.

11 What the Port fails to appreciate, however, is that the City has petitioned the
12 Commission only to rule pursuant to its statutory obligation under RCW 81.53.030 to
13 determine the practicality of anything other than a grade-level crossing. Once the
14 Commission determines the practicability of a crossing either above or below grade, it is
15 authorized to grant or deny the petition at that location. But, the determination of whether
16 and to what extent a city has condemnation authority over Port property or any other
17 property is not the province of the Commission. That determination rests with the courts.

18 **a. The Washington Supreme Court long ago focused on the issue**
19 **of limited jurisdiction.**

20 Roads and railroads have been in potential conflict for a long time in this State. It
21 is therefore not surprising that this same issue came before the Washington Supreme
22 Court some time ago, and that it was decided in favor of the position the City takes here.
23 *State ex rel. City of Toppenish v. Public Service Commission*, 114 Wash. 301, 194 P. 982
24 (1921).

1 In *Toppenish*, the Commission had determined that it was not practicable to cross
2 the railroad tracks dividing the city, but that it was too dangerous to do so, and dismissed
3 the city's petition. Both the Superior Court and the Supreme Court overturned the
4 Commission's action, however, ruling that the Commission did not have discretion to
5 deny the grade-level crossing authority, once it had determined that an above or below
6 grade was impractical.

7 The Supreme Court interpreted the existing statute as follows:

8 ". . . a critical reading of all these statutory provisions can lead only to the
9 conclusion that the commission is not therein given power to decide whether or not
10 there shall be any crossing, but is only given the power to decide what kind of a
11 crossing shall be established. . . . the question to be determined by the commission
is only whether or not a 'separation of grades is practicable,' and not whether or
not there shall be any crossing."

12 *Toppenish*, 114 Wash. at 307.

13 The statute was amended in 1937, (ch. 22, Laws of 1937), to allow Commission
14 discretion to deny a permit if an above or below grade crossing is not practicable. As the
15 subsequent sections of the code demonstrate, however, the Commission's additional
16 considerations are directed to the safety of a grade-level crossing if that is the only
17 practicable solution. The Commission's powers do not extend to adjudicating the
18 condemnation authority of any government.

19 **b. Superior Court has exclusive jurisdiction to hear condemnation**
20 **issues.**

21 Jurisdiction to determine the scope and authority of the City's condemnation
22 powers lies with the Superior Court. Specifically, Article IV, Section 6 of the Washington
23 Constitution provides:

24 The Superior Court shall have original jurisdiction in all cases in equity and
25 in all cases at law which involve the title or possession of real property, . . .

1 *The Superior Court shall also have original jurisdiction in all cases and of*
2 *all proceedings in which jurisdictions shall not have been by law vested*
3 *exclusively in some other court; . . .*

4 Washington Const., Article IV, Sec. 6 (Emphasis added).

5 Superior Court has original jurisdiction unless jurisdiction is expressly vested in
6 some other court. The Washington State Legislature specifically granted Superior Court
7 jurisdiction over eminent domain proceedings, providing:

8 Whenever any such ordinance shall be passed by the legislative authority of
9 any such city for the making of any improvement authorized by this chapter
10 . . . the making of which will require that property be taken or damaged for
11 public use, such city *shall file a petition in the Superior Court* of the County
12 in which such land is situated, in the name of the city, praying that just
13 compensation to be made for the property to be taken or damaged for the
14 improvement or purpose specified in such ordinance.

15 RCW 8.12.050 (emphasis added).

16 These statutory and constitutional mandates have been reaffirmed by the Court of
17 Appeals which determined that the judicial power under Article IV, Section 6 of the
18 Washington State Constitution is plenary “vesting in the Superior Court’s original
19 jurisdiction in all cases and of all proceedings in which jurisdiction shall not have been by
20 law vested exclusively in some other court.” *Moore v. Pacific Northwest Bell*, 34
21 Wn.App. 448, 451 (1983). The Port fails to clear this threshold issue.

22 **c. The Commission’s jurisdiction is limited to issuing a permit to**
23 **cross Port railroad tracks.**

24 The Port accurately points out that a two-step process exists to allow passage over
25 rights-of-way and railroad tracks. The Commission’s authority is to determine whether it
is appropriate to grant a petition to construct an at-grade crossing. RCW 81.53.030. No
authority has been delegated to the Commission to address eminent domain issues. Rather,

1 once the Commission grants a permit, only then is the authority to acquire property
2 through condemnation ripe for consideration. This process is expressly set forth in statute:

3 In cases where it is necessary to take, damage, or injuriously affect private lands,
4 property, or property rights . . . the right to take, damage, or injuriously affect such
5 lands, property or property rights shall be acquired by the municipality . . .
6 petitioning for such new crossing by a condemnation proceeding brought in the
7 name of such municipality . . . **as provided by law for the exercise of the power of
8 eminent domain** by such municipality or county.

9 RCW 81.53.180(2) (emphasis added). As stated above, the law expressly provides that a
10 municipality's eminent domain authority is exercised in Superior Court.

11 The respective roles of Superior Court versus the Commission are governed by the
12 doctrine of primary authority. This doctrine guides courts in determining whether to
13 refrain from exercising jurisdiction pending resolution of the matter by an administrative
14 agency with special competence. *Moore*, 34 Wn.App. at 451. In *Moore*, the plaintiff filed
15 suit alleging negligent transfer of a telephone number. Pacific Northwest Bell moved for
16 dismissal, arguing the Commission had exclusive jurisdiction. *Id.* at 450. The Court
17 disagreed, holding “[e]ven if an administrative agency is endowed with special expertise,
18 that agency should not be accorded primary jurisdiction if it is powerless to grant the relief
19 requested.” *Id.* at 452. The Court of Appeals ultimately concluded that the Commission
20 had neither the power to grant the relief Moore requested nor special confidence over the
21 subject matter of his claim. *Id.* This issue is no different in the present action.

22 The Commission has also recognized that this doctrine determines whether the
23 court or agency should make the initial decision. *Hanson Processing, LLC v. Cascade
24 Natural Gas Corp.*, 1999 WL 359774 12 (Wash. U.T.C.). The “primary jurisdiction”
25 doctrine provides:

[c]laims must be referred to an agency if (1) the administrative agency has the
authority to resolve the issues that would be referred to it by the court; (2) the
agency has special competence over all or some part of the controversy which

1 renders the agency better able than the court to resolve the issues; and (3) the claim
2 before the court involves issues that fall within the scope of a pervasive regulatory
3 scheme creating a danger that judicial action would conflict with the regulatory
4 scheme.

4 *Tenore v. AT & T Wireless Services, supra*, 136 Wn.2d at 345.

5 With regard to the first factor, there is no evidence or authority cited by the Port
6 that the Commission is authorized to determine the scope of the City's condemnation
7 authority. Rather, the Port has assumed this conclusion and argues that the Commission
8 should dismiss because issuing a permit is moot. Likewise, there is no indication this issue
9 was referred to the Commission by statute or in any reported opinion.

10 The only relationship that the Commission's determination about railroad
11 crossings has to a city's condemnation authority is the fact that its determination of a more
12 appropriate, alternate route is treated as a conclusive determination of public necessity.
13 RCW 81.53.050. Such a determination, however, says nothing about the condemnation
14 authority otherwise granted to any county, city or any of the multitude of special purpose
15 governmental entities authorized by Washington law to exercise the power of eminent
16 domain. Even if such a conclusive determination applies only to "private property," such a
17 limitation would not prevent a city from proving on its own that it has met the "public use
18 and necessity" test in a courtroom proceeding.

19 Just as the Court of Appeals determined in *Moore*, the Commission here lacks
20 jurisdiction to rule on legal issues outside its statutory grant of authority. Accordingly, the
21 Commission cannot itself adjudicate whether the City possesses authority to condemn Port
22 property and it should not speculate on how such a controversy might turn out.

23 **3. Even assuming the Commission had jurisdiction to decide an eminent**
24 **domain issue, the Port has not demonstrated that the City lacks**
25 **authority to condemn Port property.**

1 For the Commission to attempt to determine whether the City ultimately has the
2 authority to condemn Port property is beyond the province of the Commission. But, even
3 if the Commission had that authority, the Port has no conclusive argument in its favor, and
4 any doubt must be resolved in favor of the non-moving party.

5 The Port accurately cites RCW 8.12.030 which provides:

6 Every city and town . . . within the State of Washington, is hereby authorized and
7 empowered to condemn land and property, including state, county, and school
8 lands and property for streets, alleys, highways, . . . and damage the same for such
9 and for other public use after just compensation having been first made or paid
into the court for the owner in a manner prescribed by this chapter.

10 The Port argues that since ports are not specifically listed within this subsection,
11 the City lacks authority to condemn Port property. This is not true. Port Districts are
12 municipal corporations of the State of Washington. RCW 53.04.060; and *State ex rel.*
13 *O'Connell v. Port of Seattle*, 65 Wn.2d 801 (1965); *Tyrpak v. Daniels*, 124 Wn.2d 146
14 (1994). Municipal corporations are defined as “a body politic established by law as an
15 *agency of the state* – partly to assist in the civil government of the country, but chiefly to
16 regulate and administer the local and internal affairs of the incorporated city, town, or
17 district.” *In The Matter of the Petition of the Seattle Popular Monorail v. Seattle Popular*
18 *Monorail Authority*, 155 Wn.2d 612, 627, 628 (2005). It defies logic for the State of
19 Washington to grant municipalities the authority to condemn state property but not state
20 agency property. Therefore, the Port’s position that its property cannot be condemned is
21 not conclusive, as it would like the Commission to believe.

22 The Port argues “the City cannot condemn the property of another municipality
23 unless expressly authorized by statute” citing *Cle Elum v. Kittitas County*, 107 Wash. 326,
24 330 (1919). In *Cle Elum*, the Court ruled a county did not have the right by implication to
25 take city property for county road purposes. *Id.* at 330. This early 1900s opinion, however,

1 does not consider the current broad scope of statutory authority granted to cities under
2 RCW 8.12.030, and that a county's authority is more limited than a city's. Compare
3 chapters 8.08 RCW and 8.12 RCW.

4 In addition, not only is the Port an agency of the state, the power to condemn
5 conferred on municipalities is not construed as strictly as the Port suggests. Specifically,
6 those condemnation powers conferred upon a municipality are given in express terms "or
7 by necessary implication." *City of Seattle v. State of Washington*, 54 Wn.2d 139, 143
8 (1959) (emphasis added). In *Seattle v. State*, the Supreme Court, held that the City of
9 Seattle had authority by necessary implication to condemn lands outside the city limits
10 even though the enabling statute did not specifically confer such authority. *Id.* at 147.

11 The Port cites *Seattle Popular Monorail Authority* for the proposition that there is
12 no inherent power to condemn public property. In that case, the respondent to the
13 condemnation alleged that the Seattle Monorail Authority lacked authority to condemn
14 private property. *Seattle Popular Monorail*, 155 Wn. 2d at 616. But, the State Supreme
15 Court rejected the argument. *Id.* The Court recognized that while the grant of eminent
16 domain authority may be strictly construed, it is not construed so strictly as to defeat the
17 purpose of the legislative grant. *Id.* at 622. Further, condemnation power may be implied
18 if its existence is reasonably necessary to effect the purpose of the condemning authority.
19 *Id.*

20 The Commission may take notice that Kennewick is a code city. "The City of
21 [Kennewick], as a code city under RCW Title 35A, enjoys the broadest powers available
22 under the constitution unless expressly denied by statute." *Bellevue v. Painter*, 58 Wn.2d
23 839, 843, 795 P.2d 174 (1990).

24 The City is authorized to exercise its eminent domain authority to condemn any
25 "land and property, **including** state, county, and school lands." RCW 8.12.030 (emphasis

1 added). The broad grant of authority is not limited to only those public lands. The term
2 “including” is not a limiting term. The word “includes” is “a term of enlargement.” *Queets*
3 *Band of Indians v. State*, 102 Wn.2d 1, 4, 682 P.2d 909 (1984) (citing 2A Norman J.
4 Singer, *Statutes and Statutory Construction* § 47.07, at 82 (4th ed. 1973). The City has
5 authority to extend a street through Port property just as it would through state property.
6 Such authority is reasonably necessary to respond to growth and expand a city’s street
7 system. Extending a street through state land, county land, and school lands but being
8 blocked by port district property would defeat the purpose of RCW 8.12.030. The power
9 is not denied to the City. Further, it is both implied and reasonably necessary to effect the
10 purpose of the statute for the City to have the power to condemn Port property.

11 **4. The proceedings are not moot.**

12 A case is only moot if the court cannot provide the “the basic relief originally
13 sought.” *Dioxin/Organochlorine Center v. Pollution Control Hearings Board*, 131 Wn.2d
14 345, 350 (1997). The basic relief sought by the City is a determination that an above or
15 below grade crossing is not practicable and the issuance of a grade-level railroad crossing
16 permit. That relief is within the Commission’s jurisdiction and the matter is properly
17 before it for decision. The City does not seek to condemn Port property through this
18 action.

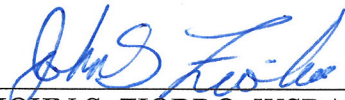
19 As acknowledged by the Port, this is the first step in a two-step process. The next
20 step, if negotiations fail, would be a condemnation action in Benton County Superior
21 Court, not before the Commission.

22 **VI. CONCLUSION**

23 It is undisputed that Superior Court has original jurisdiction to hear eminent
24 domain proceedings. It is also clear that this authority has not been delegated to the
25 Commission. The Commission, on the other hand, possesses special competence over the

1 practicality and safety of grade-level railroad crossings. Even if there is a colorable
2 argument that cities lack authority to condemn port property, no authority has been
3 presented by the Port that the Commission's role is to guess what a court might do. The
4 Commission must exercise its statutory duty to determine whether an above or below level
5 crossing is practicable and, if not, how best to make a grade-level crossing safe.
6 Accordingly, the Port's motion must be denied.

7 Respectfully submitted this 28th day of February, 2006.

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