

BEFORE THE WASHINGTON STATE  
UTILITIES AND TRANSPORTATION COMMISSION

WASHINGTON STATE DEPARTMENT  
OF TRANSPORTATION,

Petitioner,

v.

CENTRAL PUGET SOUND REGIONAL  
TRANSPORTATION AUTHORITY  
(SOUND TRANSIT); CITY OF  
LAKEWOOD; and TACOMA RAIL,

Respondents.

DOCKET TR-081229

WSDOT'S RESPONSE IN  
OPPOSITION TO CITY OF  
LAKEWOOD'S MOTION TO  
RESCIND FINAL ORDER

USDOT: 085400D

UTC: 43A7.88

1           The Washington State Department of Transportation (hereafter "WSDOT") respectfully requests the Washington State Utilities and Transportation Commission (hereafter "WUTC" or "Commission") deny the City of Lakewood's (hereafter "City") Motion to Rescind Final Orders entered in Dockets TR-081229, TR-081230, TR-081231 and TR-081232 (hereafter collectively referred to as "Order" or "Orders").

**I. BACKGROUND FACTS**

2           WSDOT filed petitions seeking WUTC approval of modifications to the four crossings at issue in July 2008. (See Jeffers Declaration, paragraph 4.) The City was aware that WSDOT was the petitioner in those matters and that WSDOT was petitioning for these safety modifications because the crossings are on the route of the Point Defiance Bypass project. (See Jeffers Declaration, paragraphs 6-10.) Nevertheless, the City made the decision to waive its right to request a hearing and to object to the proposed

WSDOT'S RESPONSE IN OPPOSITION  
TO CITY OF LAKEWOOD'S MOTION  
TO RESCIND FINAL ORDER  
(DOCKET TR-081229)

1

ATTORNEY GENERAL OF WASHINGTON  
Transportation & Public Construction Division  
7141 Cleanwater Drive SW  
PO BOX 40113  
Olympia, WA 98504-0113  
(360) 753-6126 Facsimile: (360) 586-6847

modifications. (See Jeffers Declaration, paragraph 8.) The Commission, acting through its Executive Director and Secretary, granted WSDOT's petitions, and issued its Orders authorizing the proposed modifications in September 2008.

3           The City received a copy of the relevant Orders, each of which included notice that: "You must file a request for Commission review of this Order no later than fourteen (14) days after the date the decision is posted on the Commission's Web site." And that: "The Commission will grant a late filed request for review only on a showing of good cause, including a satisfactory explanation of why the person did not timely file the request." The City neither requested review of the Orders, nor appealed to the Superior Court pursuant to RCW 81.53.170. The deadlines for reconsideration or appeal have long since passed, and the Orders are final. Both WSDOT and its partners in this project have made commitments and taken actions in reliance on the finality of these Orders. (See Jeffers Declaration, paragraphs 11-15.)

4           The City now asks the Commission to rescind these Orders as a means to provide it with a second opportunity to oppose the crossing modifications. The reason the City offers for its change of heart is that it only waived its right to contest WSDOT's petition because it thought that to waive the hearing would facilitate Sounder service coming to Lakewood. Now that Sound Transit is committed to bringing Sounder service to Lakewood, the City opposes the use of these crossings by Amtrak and wants to frustrate the project by opposing those very same crossing improvements. For the reasons set forth below, the fact that Lakewood does not favor the use of this route for Amtrak passenger service does not constitute grounds to set these Orders aside.

## II. ARGUMENT

### A. Finality of Judgments and Good Cause

5           The City asks the Commission to set aside its Final Orders for no other purpose than to provide it a second opportunity to request a hearing and litigate its opposition to use of the Point Defiance Bypass route for Amtrak passenger service. Those Orders were entered nearly eighteen months ago. Contracts to perform the work have been executed, and construction has begun.

6           Parties to a potential dispute have to be able to rely on the finality of an adjudicative order to make prudent decisions. As is the case with final judgments entered by the courts, public policy disfavors collateral attacks on final administrative orders. *Lejeune v. Clallam County Board of Commissioners*, 64 Wn. App. 257, 823 P.2d 1144 (1992) (Holding Res Judicata or claim preclusion applies to quasi-judicial decisions by administrative tribunal, as well as to judicial decisions by the court.)

7           WSDOT and Sound Transit have committed significant funds, staff time, and other resources based on the understanding that approval of these petitions authorizing the crossing modifications was final. Such final Orders should not be set aside without a showing of good cause akin to the showing required to vacate a judgment or order entered in superior court under CR 60(b). Under that rule, a motion to vacate can be brought on the basis of mistake, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order; or by a showing of newly discovered evidence which by due diligence could not have been discovered in time to move for continuance. The reason provided by the City to upset the parties' reliance on these final Orders is in no

way comparable to the kind of reasons that might justify a court to vacate a final order, and should, therefore, be rejected.

8           The reason the City provides for setting aside these Orders is simply that officials have changed their mind. Any suggestion that the City did not understand why WSDOT was pursuing these modifications and the relationship these petitions had to the Point Defiance Bypass project is belied by the fact that, in 2007, in WUTC Docket TR-070114, the City itself petitioned for, and was granted, permission to include sidewalks at the Bridgeport crossing. Paragraph 5 of the Order granting the City's petition provides that:

The Bridgeport Way crossing is part of the Washington State Department of Transportation's (WSDOT) Rail Point Defiance Bypass Project, which will bring passenger rail service through Lakewood. This future project will provide for track realignment, the addition of a second track, new lights and gates, and potentially installation of roadway medians and wayside horns at this crossing. Once all project improvements are complete at this crossing and passenger service is implemented, passenger trains will travel through the Bridgeport Way crossing at speeds up to 79 mph.

9           Thus, the City submitted its waivers obviously knowing that the subject of the hearings was in regards to the modifications proposed by WSDOT in support of the Point Defiance Bypass project. The City nevertheless waived its right to request a hearing, apparently because they thought their support of WSDOT's petition would facilitate the work necessary to bring Sounder services to Lakewood. Having achieved its goal with respect to Sounder services, the City now seeks another chance to request a hearing to challenge those very same modifications as a means to oppose the Point Defiance Bypass project.

10           The City does not base its motion to set aside these Orders on any fact that would suggest mistake, surprise, excusable neglect or irregularity as those terms are used in

CR 60(b). And, the only change in circumstances that the City relies on to justify vacating these Orders is that it is no longer convenient for the City to support the crossing modifications now that Sound Transit is committed to serving Lakewood. The City now wants a hearing to oppose these crossing improvements as a means to oppose the use of this corridor by Amtrak because it is not convinced that Amtrak service benefits the City. The fact that the City supports crossing modifications necessary to facilitate Sounder passenger rail, but opposes those same modifications if it would facilitate Amtrak passenger service, is not a reason that would constitute good cause to vacate a judgment or order under CR 60(b), and should not be sufficient to support the City's comparable motion to rescind.

11           Additionally, the City's motion to rescind is not brought within a reasonable time after issuance. A motion to vacate under CR 60(b) has to be brought within a reasonable time, and is generally barred if not brought within one year after entry. Here, the City waited nearly eighteen months to bring this motion, which is well beyond any reasonable time frame for seeking to set aside a final order.

**B.     Rescinding Orders Would be Futile, as it Would Not Invoke Commission's Authority to Grant the Relief Sought**

12           Moreover, to the extent the City's ultimate objective is to seek a hearing to ask the Commission to order that grade crossings within the City be grade separated, that relief is outside the scope of these petitions, so that granting the City's motion as a means to achieve that relief would be futile.

13 According to the City's motion, the reason it wants the Orders in TR-081229, TR-081230, TR-081231, and TR-81232 set aside is so that those petitions can be consolidated for hearing with those pending in Dockets TR-100127, TR-100128, TR-100129, and TR-100131 (consolidated dockets). The City's reasoning is based on its assumption that pursuant to RCW 81.53.020, "all seven crossings, those for which waivers have been filed and those which are pending hearing, are subject to state law requiring grade separation where practicable." That statute, however only applies to "railroads and extensions hereafter constructed." Thus, RCW 81.53.020 applies only to newly established grade crossings, while the grade crossings at issue in these matters already exist.

14 RCW 81.43.030 addresses the WUTC's authority "in respect to existing railroad grade crossings over highways the construction of which grade crossings was accomplished other than under commission order authorizing it." For such existing crossings, "the commission may in any event require the railroad company to install and maintain . . . a sign known as a crossbuck crossing sign . . . ."

15 Thus, except in respect to the authority to order installation and maintenance of crossbuck signs, the Commission's regulatory authority over proposed modifications to existing grade crossings, including the seven crossings within the City of Lakewood, does not come under RCW 81.53.020, and instead must be invoked by those entities identified in either RCW 81.53.060 or RCW 81.53.261, by filing a petition pursuant to those provisions, and by giving notice of its petition to all parties entitled under those statutes. RCW 81.53.261 applies whenever a petitioner believes that the public safety

requires an upgrade to the railroad signals or other warning devices other than crossbuck signs. RCW 81.53.060 gives a petitioner an additional opportunity to petition the WUTC to order an existing crossing to be closed, grade separated, or to order alteration in the method and manner of an existing crossing and its approaches.

16 Both of these statutes (RCW 81.53.060 or RCW 81.53.261) apply to proposed modifications to existing grade crossings and invoke the Commission's authority to determine if the modification, closure, or grade separation sought by the petition is necessary for the public safety, and, if so, how the cost of the proposed modifications will be apportioned between the railroads, and the relevant road authorities.

17 The grade crossings in Lakewood are not new and so RCW 81.53.020 expressly does not apply. They were constructed as at grade crossings some time prior to this project, and so the question whether it would have been practicable to grade separate them is simply not a question before the Commission in these cases. Because no entity has filed a petition seeking grade separation pursuant to RCW 81.53.060, or has provided the notice to those statutorily entitled entities under that statute, the City's hypothetical grade separation proposal cannot be adjudicated in any of the matters currently pending. Consequently, even if the WUTC were to set aside these Orders, and to consolidate the WSDOT petitions for modification with those that are pending, that would not be sufficient to provide the WUTC with the authority to order the grade separation that is the City's stated objective.

18 As the local road authority, the City's remedy to pursue an under crossing or an over crossing at one or more of these seven existing crossings is to file its own petition

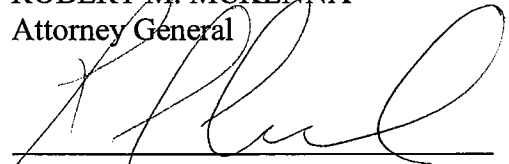
under RCW 81.53.060. Of course, notice of such a petition would have to be given to all entities entitled under the statute, and the proponent of the grade separation petition would carry the burden to establish that grade separation is necessary for the public safety, and demonstrate a feasible means by which to fund it.

### III. CONCLUSION

19 The City's motion to rescind final Orders entered in TR-081229, TR-081230, TR-081231, and TR-081232 is tantamount to a motion to vacate a final court order or judgment. As such, it should be denied because it was neither reasonably timely, nor is it based on good cause. Moreover, because the relevant Lakewood grade crossings already exist, and no entity has petitioned to construct a new crossing or to construct a grade separated crossing, the WUTC is presently without the authority to grant the ultimate relief that the City seeks such that rescission of these Orders would be futile. WSDOT respectfully requests the City's motion to rescind Orders be denied.

DATED this 5th day of April, 2010.

ROBERT M. MCKENNA  
Attorney General



L. SCOTT LOCKWOOD, WSBA No. 19248  
Assistant Attorney General  
Attorneys for Defendant