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November 27, 2019

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Ms. Cynthia T. Brown
Chief, Section of Administration, Office of Proceedings
Surface Transportation Board
395 E Street, SW
Washington, DC 20423-0001

ENTERED
Office of Proceedings
November 27, 2019
Part of
Public Record

Re: Finance Docket No. 36261, Ballard Terminal Railroad Company, L.L.C. –
Petition for Declaratory Order

Dear Ms. Brown:

Pursuant to ordering paragraph no. 2 of the Board's Decision served June 27, 2019, in the above-referenced proceeding, the undersigned hereby submits the November 13, 2019 Decision of the King County Superior Court in *City of Seattle v. Ballard Terminal Railroad Company, L.L.C.*, No. 19-2-01794-5 SEA. The Decision granted in part and denied in part a partial motion for summary judgment filed by the City of Seattle, and also granted in part and denied in part a cross-motion for partial summary judgment filed by Ballard Terminal Railroad Company, L.L.C.

As indicated in the Board's Decision, the Parties will submit a status report (jointly, if possible, or separately) by December 27, 2019.

Respectfully submitted,

A handwritten signature in black ink, reading "Michael F. McBride".

Michael F. McBride
Attorney for the City of Seattle

cc (via email): Joshua C. Allen Brower, Esq.
Patrick J. Schneider, Esq.

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7 SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR KING COUNTY

8 CITY OF SEATTLE, a Washington municipal
corporation, acting through its Department of
9 Transportation;

10 Plaintiff,

11 v.

12 BALLARD TERMINAL RAILROAD
COMPANY, L.L.C., a Washington limited
liability company;

13 Defendant.
14

NO. 19-2-01794-5 SEA

ORDER GRANTING IN PART AND
DENYING IN PART CITY OF SEATTLE'S
MOTION FOR PARTIAL SUMMARY
JUDGMENT, AND GRANTING IN PART
AND DENYING IN PART BALLARD
TERMINAL RAILROAD COMPANY'S
CROSS MOTION FOR PARTIAL
SUMMARY JUDGMENT

15 This matter came on before the Court on the Plaintiff City of Seattle's ("City") Motion for
16 Partial Summary Judgment, filed October 4, 2019. Defendant Ballard Terminal Railroad Company,
17 L.L.C. ("BTRC"), opposed the motion and sought cross summary judgment regarding the same issues
18 of contract interpretation. This Court considered the pleadings, records, and files herein, including:

- 19 1. *City of Seattle's Motion for Partial Summary Judgment* (October 4, 2019);
20 2. *Declaration of Louisa Miller in Support of the City of Seattle's Motion for Partial Summary*
21 *Judgment*, with exhibits attached thereto (October 4, 2019);
22 3. *Defendant's Response to Plaintiff's Motion for Partial Summary Judgment* (October 21,
23 2019) [as corrected October 22, 2019];

- 1 4. *Declaration of Joshua C. Allen Brower*, with exhibits attached thereto (October 21, 2019)
- 2 [as corrected October 22, 2019];
- 3 5. *Declaration of Paul Nedrum in support of Defendant's Response to Plaintiff's Motion for*
- 4 *Partial Summary Judgment* (October 21, 2019);
- 5 6. *City of Seattle's Reply in Support of its Motion for Partial Summary Judgment* (October
- 6 28, 2019);
- 7 7. *Declaration of Tadas Kisielius in Support of the City of Seattle's Reply in Support of its*
- 8 *Motion for Partial Summary Judgment*, with exhibits attached thereto (October 28, 2019);
- 9 and
- 10 8. *Declaration of Fred Wert in Support of the City of Seattle's Motion for Partial Summary*
- 11 *Judgment* (October 28, 2019).

12 The Court heard oral argument of counsel for the parties on November 1, 2019 and considered
13 that argument in conjunction with the Motion, cross motion, evidence, and pleadings referenced above.

14 **I. EVIDENTIARY AND COURT RULE ISSUES**

15 1.1 To interpret the agreement at issue, the Court considered context evidence submitted
16 by the parties as Washington law requires. The parties made several evidentiary objections. The Court
17 did not consider the 4/19/18 letter of Paul Nedrum (attached to *Decl. of Brower*) and portions of the
18 Paul Nedrum declaration and the Fred Wert declaration regarding their unilateral intentions or
19 understandings related to the agreement at issue because these statements are not proper context
20 evidence. *See Berg v. Hudesman*, 115 Wash.2d 657, 667, 801 P.2d 222 (1990).¹ Exhibit 17 to the
21 *Decl. of Brower* is properly admissible. The Court did not consider Exhibit 18 to the *Decl. of Brower*
22 because it contains hearsay and is not authenticated.

23 ¹ "Extrinsic evidence is to be used only to 'illuminate what was written, not what was intended to
be written.'" *Id.*, citing *Hollis v. Garwall, Inc.*, 137 Wash.2d 683, 697, 974 P.2d 836 (1999).
"Extrinsic evidence is not admissible to show 'a party's unilateral or subjective intent as to the
meaning of a contract word or term'; to show an intent 'independent of the instrument'; or to 'vary,
contradict, or modify the written word.'" *Id.*, citing *Hollis*, 137 Wash.2d at 695, 974 P.2d 836.

1 1.2 As indicated at oral argument, the Court will not refuse to consider BTRC's cross
2 motion for summary judgment. Either party, including a nonmoving party, may receive summary
3 judgment if no material facts are in dispute. *Patriot Gen. Ins. Co. v. Gutierrez*, 186 Wash.App. 103,
4 110, 344 P.3d 1277, *review denied*, 183 Wash.2d 1016, 353 P.3d 641 (2015). *See also Hood Canal*
5 *Sand and Gravel, LLC v. Goldmark*, 195 Wash.App. 284, 295-297, 381 P.3d 95 (2016) (affirming
6 consideration of cross motion for summary judgment included in a response brief that relied on the
7 same facts and legal theories as advanced by the other party). BTRC seeks relief on the same issues
8 the City raised in its Motion. The parties' evidentiary submissions are largely duplicative. The City
9 has shown no prejudice. The City fully briefed the issues in its own pleadings and had ample
10 opportunity to prepare and present argument and authorities. Resolution of the cross motion is an
11 efficient and fair way to resolve the issues.

11 II. ANALYSIS AND CONCLUSIONS OF LAW

12 Each party presented numerous arguments and context evidence to support its interpretation of
13 the Operating Agreement. The Court has considered each argument and the evidence in the record.
14 The Court is satisfied that the meaning of the contract is a legal issue, and that only one legal meaning
15 exists regarding the issues presented. The following explains significant considerations that support
16 the Court's order:

17 2.1 The purpose of the September 14, 1997 Operating Agreement "is to preserve the line
18 intact for rail use, trail use, and other compatible public purposes, provided, however, that Owner shall
19 not be obligated to subsidize, directly or indirectly, rail use on the line other than as specifically
20 provided herein." History demonstrates that the parties—including the City, who is the successor
21 Owner—succeeded in meeting this overall purpose. The Ballard Line has been preserved over the
22 past 22 years. In this lawsuit, the parties litigate whether they secured certain specific rights in the
23 Operating Agreement that are material to a present effort by the City to construct what is called today
the "Missing Link," a section of the Burke-Gilman Trail on or near Shilshole Avenue NW that has not
yet been constructed.

1 2.2 The Court must determine whether the Operating Agreement reflects a meeting of the
2 minds regarding whether and where to build the future “Missing Link,” and whether the parties,
3 through the Operating Agreement, secured rights regarding construction of that portion of a future
4 trail. The Court concludes the Operating Agreement does not reflect such an intent. The parties did
5 not reach a negotiated bargain that creates enforceable rights on whether and where to build the
6 “Missing Link” today.

7 2.3 To resolve the issues before the Court, the parties both point to Section 10 of the
8 Operating Agreement, which addresses “Rail and Trail facilities.” In Section 10(a), the parties “agree”
9 that “trail and railroad” “shall be constructed” “within the areas indicated in Exhibit D in all portions
10 of the premises which are not in street right of way.” (underline added). The “Missing Link” on
11 Shilshole Avenue NW is the area of the Ballard Line (also known in the agreement as “the premises”)
12 that *is* in the street right of way. Section 10(a) demonstrates a meeting of the minds to construct a trail
13 alongside the rail in locations that are not in the street right of way, i.e., not on Shilshole Avenue NW
14 but north and south of it. BTRC agrees with that interpretation, and argues that Section 10(a) also
15 demonstrates *by implication* the parties’ intent to *preclude* construction of trail in the street right of
16 way. BTRC argues Section 10(a) should be read to incorporate agreement to all trail locations depicted
17 on Exhibit D, including a depiction of trail on Leary Avenue NW denoted as “Planned Bike Lanes.”
18 These arguments fail.

19 2.4 Section 10(a) expresses the parties’ agreement as to the trail and rail locations north
20 and south of Shilshole Avenue NW that are not in the street right of way where the parties agree the
21 trail “shall be” constructed. However, it does not express *any agreement* about trail construction and
22 location concerning that part of the Ballard Line that *is* in the street right of way. Section 10(a) neither
23 expressly agrees to locating a trail there, nor precludes locating a trail there. Exhibit D is incorporated
only to show the areas indicated “in all portions of the premises which are not in street right of way.”
The parties express no additional agreement regarding another purpose, meaning or depiction in
Exhibit D relevant to the terms of Section 10(a). Section 10(a) is silent on whether and where to

1 construct the portion of the trail at issue today: the Missing Link. Section 10(a) makes no reference,
2 for example, to construction of trail on Leary Avenue NW or on Shilshole Avenue NW, including no
3 reference to constructing or not constructing a trail in the street right of way. Finally, Leary Avenue
4 NW is not “in the premises,” so the first sentence of Section 10(a) necessarily does not reflect an
5 agreement to construct trail on Leary Avenue NW. In sum, the agreement reflects no meeting of the
6 minds on the issue of whether and where to construct the Missing Link, and contains no promise from
7 the City not to construct the Missing Link on Shilshole Avenue NW.

8 2.5 The context evidence informs this interpretation. First, contemporaneous documents
9 demonstrate that a future location for the Missing Link was under study, but had not been determined
10 or agreed to when the Operating Agreement was entered. A “preferred location” for such a trail, a
11 term used at the time in municipal documents,² is not a selected or agreed-upon location. That the
12 parties themselves, including the City, had not committed to a location as shown in municipal
13 documents supports the Court’s conclusion that the Operating Agreement does not commit the parties
14 to a location and should not be read either to preclude or bless a location by implication.

15 2.6 The context evidence further demonstrates that the City publicly recognized the
16 limitation of the agreement when it granted the franchise to BTRC based on the Operating Agreement
17 in late September 1997, and at that time described the agreement as permitting interim trail use “*at*
18 *least* in those locations where the rail is not in street right-of-way,” as follows:

19 (b) That this ordinance [granting a franchise to BTRC] shall be effective
20 only when the following conditions are first satisfied: ... (iv) that Grantee has
21 entered into an Operating Agreement with the City of Seattle in conformity to
22 this ordinance and specifying a program of joint use permitting for interim trail
23 use alongside rail use *at least in those locations where the rail is not in street*
right-of-way.”

24 ² For example, the terms “preferred alternative” and “preferred location” appear in the City’s November 12, 1996
25 Resolution 29474 and the City’s September 29, 1997 Ordinance 118734. These documents and others make clear that
26 at the time the Operating Agreement was executed, all parties were aware of the City’s desire to ultimately complete
27 the entire trail at some point in the future. That awareness, however, is not sufficient to support a conclusion that
28 BTRC and the City reached a negotiated bargain concerning construction of a trail between 11th Avenue and the Locks.

1 Ordinance 118734, Section 1(b)(iv) (emphasis added). In the ordinance, the City required that the
2 City obtain through the Operating Agreement the right to rail and trail in those locations where the rail
3 is not in the street right of way. In the ordinance, the City explicitly did not require that the City obtain
4 rights to construct trail where the rail is in the street right of way.³ This further informs the Court's
5 conclusion that the parties did not resolve future completion of the entire trail.

6 2.7 Additionally, in the draft grant letter to WSDOT that is attached to the Operating
7 Agreement, the City's predecessor, SLR, describes a "key purpose" of the transaction "to permit the
8 continuation of rail service through a new shortline railroad (BRTC [sic]), while at the same time
9 allowing extension of the Burke-Gilman Trail from Eighth Avenue to Eleventh Avenue and north of
10 the Government locks." Ex. H to Operating Agreement. This description of the "allowed extension"
11 omits the area that is the Missing Link, which is consistent with the Court's interpretation of the
12 Operating Agreement.

13 2.8 In sum, the Operating Agreement as illuminated by context evidence does not reflect
14 that BTRC and the City reached a negotiated bargain concerning construction of a trail between 11th
15 Avenue and the Locks. In these circumstances, the Court will not imply a right in favor of either party
16 that is absent from the Operating Agreement. The law does not permit the Court to add to the
17 Operating Agreement a term endorsing, settling on, or rejecting a route for the Missing Link.

18 2.9 The Operating Agreement contains one provision applicable to the Missing Link. This
19 is a notice requirement concerning eventual extension of the trail between 11th Avenue and the Locks
20 "within the premises," as follows:

21 Effective when the City becomes Owner under this Operating Agreement, City
22 undertakes to provide Operator with 120 days notice, and a subsequent opportunity to
23 consult, prior to City's presentation of a request for initial authorization or financing

³ Additionally, the Memorandum of Understanding signed September 16, 1997 between SLR and the City (Ex. K to the Operating Agreement), reiterated the area in which the City would be extending the Burke-Gilman Trail pursuant to the transactions when it provided for immediate access to the property by the City "to expedite construction of additions to the Burke-Gilman Trail west of the Government Locks and between Eighth Avenue and Eleventh Avenue...." This description, like the others identified in this order, does not include the area in the street right of way.

1 for an extension of the Burke-Gilman Trail in the area between 11th Avenue and the
2 Locks within the premises....

3 Operating Agreement, Section 10(i). Thus, the parties agreed on notice provisions regarding any
4 future trail construction between 11th Avenue and the Locks within the premises, which would include
5 the Missing Link as currently proposed within the premises. A right to receive notice and an obligation
6 to provide notice regarding requesting authorization or financing stand in contrast to a right to
7 construct or locate trail. The parties secured the former; the parties did not secure the latter regarding
8 the Missing Link.

9 2.10 Based on the Court's interpretation of the Operating Agreement as a matter of law,
10 BTRC did not secure the right to preclude trail construction in the street right of way. Nor did the
11 City secure BTRC's agreement to trail construction in the street right of way. The Court holds that
12 provisions in Section 10(e) regarding "the right to require Operator to relocate its track in order to
13 accommodate trail construction in accordance with this Agreement" are limited by the terms of Section
14 10(e) and the subject matter of the agreement to the agreed-upon trail construction in areas not in the
15 street right of way. Section 10(e) requires the Operator to promptly move its track at Owner's written
16 request to accommodate the construction of the agreed-upon trail construction; it does not require such
17 accommodation for future construction of the Missing Link, which is not "trail construction in
18 accordance with this Agreement." Similarly, Section 10(f) prohibits rail or rail-related construction
19 that interferes "with the trail to be constructed on the premises." This prohibition applies to the agreed-
20 upon trail construction in areas not in the street right of way, not future construction of the Missing
21 Link along Shilshole Avenue NW, for which there was no agreement to construct.

22 **III. ORDER**

23 NOW THEREFORE, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that:

1. The City's Motion for Partial Summary Judgment is GRANTED IN PART AND DENIED IN PART, and BTRC's Cross Motion for Partial Summary Judgment is GRANTED IN PART AND DENIED IN PART;

King County Superior Court
Judicial Electronic Signature Page

Case Number: 19-2-01794-5
Case Title: CITY OF SEATTLE vs BALLARD TERMINAL RAILROAD CO

Document Title: ORDER GRANTING IN PART/DENYING PMSJ

Signed by: Averil Rothrock
Date: 11/13/2019 3:25:31 PM

A handwritten signature of Averil Rothrock in black ink, enclosed within a rectangular border. The signature is written in a cursive style.

Judge/Commissioner: Averil Rothrock

This document is signed in accordance with the provisions in GR 30.

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