The Honorable Marsha J. Pechman

IN THE UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

SAMMAMISH HOMEOWNERS, THOMAS E. HORNISH and SUZANNE J. HORNISH, TRUSTEES OF THE THOMAS E. HORNISH and SUZANNE J. HORNISH JOINT LIVING TRUST; TRACY and BARBARA NEIGHBORS; ARUL MENEZES and LUCRETIA VANDERWENDE; and HERBERT MOORE and EVELYN MOORE,

Plaintiffs,

vs.

KING COUNTY, a home rule charter county,

Defendants.

No. 15-cv-00284MJP

PLAINTIFFS' OPPOSITION TO DEFENDANT KING COUNTY'S FRCP 12(b)(1) & (6) MOTION TO DISMISS FOR LACK OF STANDING

NOTE ON MOTION CALENDAR: April 17, 2015

I. INTRODUCTION

Plaintiffs filed their Complaint for Declaratory Relief and to Quiet Title on February 25, 2015. Plaintiffs in Count I allege that they are fee owners of property adjacent to an abandoned right-of-way in King County, and also owned the underlying fee in the railroad right-of-way pursuant to the centerline presumption, and that they are entitled to a declaration of rights that the original source conveyances to the railroad were easements, that the easements were for railroad purposes only, and that they are

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the fee owners of the railroad right-of-way at issue, including subsurface and aerial rights.[1] Plaintiffs in Count II seek to quiet title in their fee ownership of the right-of-way because King County has wrongly claimed fee ownership of the right-of-way with respect to plaintiff's subsurface and aerial rights and at a greater width that the railroad actually transferred to King County for purposes of a hiking and biking trail.[2]

Defendant King County filed a Motion to Dismiss on March 23, 2015 (Doc. 9). King County alleges that the individually-named Plaintiffs lack standing to raise their claims because they cannot demonstrate an ownership interest in the right-of-way pursuant to the centerline presumption under Washington law. King County also argues that Sammamish Homeowners also lack standing because it does not have any ownership interest in the corridor and because the Homeowners' Association does not qualify for representational standing on behalf of the individual members of the homeowners' association.

King County's arguments are fatally flawed from both a timing standpoint and a legal standpoint. Because this Court must accept all of the factual allegations in the Complaint as true at this point, King County's assertion that these landowners do not own fee title to the centerline of the right-of-way must fail.[3] Furthermore, and most importantly, King County misunderstands and misapplies the centerline presumption as

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[1] A related case entitled *Kaseburg v. Port of Seattle, et al.*, Case No. 2:14-CV-000784-JCC involves a similar circumstance also involving a hiking and biking trail and Judge Coughenour has already denied the Defendants' Motion to Dismiss (Doc. 59).

[2] Plaintiffs herein are simultaneously filing herewith a motion to amend the original complaint to add 57 additional plaintiffs.

[3] Plaintiffs will ultimately prove in this case that they own to the centerline of the railroad corridor because *Roeder*, if applicable at all, merely rebuts the presumption that the landowners owned to the centerline.

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set forth in *Roeder Co. v. Burlington Northern, Inc.*, 716 P.2d 855 (Wash. 1986) and Plaintiffs will ultimately prove fee ownership for all individual landowners in the right-of-way who owned fee title adjacent to the right-of-way. Finally, Sammamish Homeowners clearly has representational standing to bring this action on behalf of its members pursuant to the specific authority from the Supreme Court of the United States that King County purportedly cites as supporting their position. *See Hunt, Governor of North Carolina v. Washington State Apple Advertising Comm.*, 432 U.S. 333 (1977).

II. STANDARD OF REVIEW

Pursuant to Federal Rule of Civil Procedure 12(c), "[a]fter the pleadings are closed – but early enough not to delay trial – a party may move for judgment on the pleadings." To grant a motion for judgment on the pleadings, however, the court must conclude that the moving party is entitled to judgment as a matter of law, even after accepting all factual allegations in the complaint as true and construing them in the light most favorable to the nonmoving party. *Fleming v. Pickard*, 581 F.3d 922, 925 (9th Cir. 2009). There must be no genuine issues of material fact in dispute. *Id.*

The standard of review pertaining to a motion to dismiss is similar. A plaintiff must merely cite facts supporting a "plausible" cause of action. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-56 (2007). For purposes of a Wash. R. Civ. P. 12(b)(6) motion, the plaintiffs' factual allegations are presumed to be true and the action may be dismissed under Rule 12(b)(6) only if it appears beyond doubt that the plaintiff can prove NO set of facts, consistent with the complaint, which would entitle the plaintiff to relief. *Lawson v. State*, 730 P.2d 1308 (Wash. 1986) (emphasis added).

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By and through the National Trails System Act ("Trails Act"), 16 U.S.C.A. § 1247, King County only acquired a surface easement for a recreational trail that is also railbanked pursuant to federal law. Railbanking simply is the federal government's provision in the Trails Act to preserve jurisdiction over the former railroad right-of-way in case it ever wants to reactivate a railroad over the line. Railbanking is not a "railroad purpose," as has been held by the Federal Circuit and every Court of Federal Judge who has ever addressed the issue.

Here, Plaintiffs filed this lawsuit because Defendant King County is attempting to argue that it owns interests in the former railroad right-of-way beyond the use as a recreational trail. Plaintiffs have cited specific facts demonstrating that they own land adjoining and abutting the former railroad corridor and, under the centerline presumption adopted by the Washington Supreme Court (and the majority of states in this country), they are presumed to own fee title to the centerline of the former railroad right-of-way. *See Kershaw v. Sunnyside Ranches, Inc. v. Yakima Interurban Lines Assoc*., 126 P.2d 1308 (Wash. 1986).

III. THE DEFENDANT MISSTATES WASHINGTON LAW ON THE CENTERLINE PRESUMPTION—ALL OF THE INDIVIDUALLY-NAMED PLAINTIFFS HAVE THE BENEFIT OF THE CENTERLINE PRESUMPTION UNDER WASHINGTON LAW AND WILL PROVE FEE OWNERSHIP IN THE RIGHT-OF-WAY

Defendant King County conceded that Washington has adopted the centerline presumption. *See* Def. Mot. at p. 8. Washington has also adopted the strip and gore doctrine. Under both the centerline presumption and the strip and gore doctrine, when a

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deed conveys a tract adjoining a street or railroad right-of-way easement or other small strip of land, any ownership rights of the grantor are presumed to pass to the grantee.

The standard justification for the strip and gore doctrine is two-fold. First, efficient use of land is promoted by keeping the title to both parts unified—rarely would the grantor find a way to devote a small and narrow retained strip of land to productive use, especially where, as here, the small strip is only one or two small parcels of land over multiple miles. *See, e.g., Kershaw Sunnyside Ranches,* 126 P.3d 16. Second, including the strip comports with the parties' probable intent. *See, e.g., Roeder II,* 716 P.2d 855, followed in *Northlake Marine Works, Inc. v. City of Seattle,* 857 P.2d 283 (Wash. App. 1993); *See e.g., Besneatte v. Gourdin,* 21 Cal. Rptr. 2d 82 (Ct. App. 4th Dist. 1993); *Brown v. Penn Cent. Corp.,* 510 N.E.2d 641 (Ind. 1987); *Hedrick v. Zilge,* 368 N.W.2d 205 (Iowa Ct. App. 1985); *Pebsworth v. Behringer,* 551 S.W.2d 501 (Tex. Civ. App. Waco 1977); *Roeder Co. v. Burlington N., Inc.,* 716 P.2d 855 (Wash. 1986), followed in *Northlake Marine Works, Inc. v. City of Seattle,* 857 P.2d 283 (Wash. Ct. App. 1993); *Cantley v. Gulf Production Co.,* 143 S.W.2d 912, 915 (Tex. 1940)

Courts all over this Country apply the centerline presumption to railroad rights-of-way. For instance, the Washington Supreme Court in *Kershaw Sunnyside Ranches* upheld the majority rule in this country that the centerline presumption applies when a deed does not contain any evidence that a grantor intends to expressly reserve any interest in the property. Whether a deed contains a description by a lot, or by metes and bounds referencing a railroad right-of-way, or contains an exception of the railroad

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right-of-way, under the *Kershaw* opinion, construing the deed against the drafter and ascertaining the grantor's intent, the grantor conveys all that they own. *Kershaw* stands for the proposition that the presumption of an easement only is conveyed unless otherwise expressly indicated in the grant. *See, Haggart v. United States,* 108 Fed. Cl. 70 (2012. The majority rule is based on the longstanding construction of law involving the strip and gore doctrine and sound public policy:

> (1) the law's abhorrence of unknown ownership in property leading to extracted and prolific litigation;
>
> (2) the law favors a construction of instruments which avoids such prolific litigation because the law will presume that the grantor had no intent to retain property then burdened with a railway use and therefore having no immediate value to him; and
>
> (3) that the presumption should be indulged because the ownership of the fee under the railway carries with it valuable rights appurtenant to the property expressly conveyed.

See, e.g., Kershaw Sunnyside Ranches, 126 P.3d at 25-26; *see also Smith v. Smith*, 622 A.2d 642, 647-48 (Del. 1993).

However, Defendant improperly asserts that none of the Plaintiffs have any ownership within the former rail corridor based on the language in Plaintiffs' deeds that "exclude" or "except" or "lying south" of the right-of-way. Defendant's position is directly contrary to the Washington Supreme Court's decision in *Kershaw*. In *Kershaw*, the defendant, like Defendant King County here, also argued that Kershaw lacked standing because their ownership deed "excepted" the right-of-way. The Court ruled that Kershaw did have standing and that the words "exception" did not reserve the right-of-way unto the grantor. King County lacks candor to the Court regarding the

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Kershaw opinion. The ownership deeds in *Kershaw* were described by the Supreme Court as follows:

> On January 20, 1960, Ora Kershaw quitclaimed the Kershaw property to her son Ronald E. Kershaw, **specifically excepting** the 'right-of-way of the Northern Pacific Railway,' predecessor in interest to BNSF. In 1986, Ronald and Betty Kershaw transferred the real property to the family business, Kershaw Sunnyside Ranches. The real estate contract memorializing this transfer, in describing the property conveyed, **again excepted** from the transfer the 'right of way of the Northern Pacific Railway.' At the present time, Kershaw Sunnyside Ranches owns approximately 80-90 acres on the site transpierced by the railroad right of way.

Kershaw, 126 P.3d at 19 (emphasis added). The Supreme Court held that any ambiguity should be construed against the drafter and the exception was ambiguous. The Court held that:

> the 1960 deed's exception is ambiguous; in addition to operating to reserve an interest in the grantor, it 'logically could have been an expression of the parties' understanding that Ronald Kershaw's fee interest was subject to the railroad's easement.' Kershaw Sunnyside Ranches, 121 Wn. App. At 728. This later interpretation is supported by Ora Kershaw's further 'except[ion]' of a road and state highway. While the deed purports to except these lands, it could just as reasonably be interpreted to reference them because of the significant nature of the easements present… we hold that Ora Kershaw, by the 1960 deed, did not reserve in herself any rights in the right of way and that all said rights transferred to her son and then to Kershaw Sunnyside Ranches.

Id. at 31.

Defendant King County incorrectly bases its position that Plaintiffs lack standing on *Roeder*, 716 P.2d 855. First, *Roeder* dealt with the unique circumstances where an original railroad, BB & BC, owned the land, all of it, and platted it and reserved a strip 80 feet wide for the railroad. *See Roeder*, 714 P.2d at 1172. The words

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'reservation' or 'exception' do not control the nature of the grant but rather, "the decisive factor in determining the interest retained is the parties' intentions. *Id.*

In this case, the Plaintiffs are not railroads and it should be presumed that the grantor conveyed all they owned, such that Plaintiffs are afforded the benefit of the centerline presumption. Second, in *Roeder*, the railroad, Burlington Northern, held the land in fee as the successor in interest to BB & BC. Here, the railroad, Burlington Northern, only held an easement and the original grantor held the land in fee underlying the railroad corridor. *See Beres v. United States*, 97 Fed. Cl. 757 (Fed. Cl. 2011) (Judge Marian Blank Horn, in a Trails Act takings case, held that these exact original conveyances to the railroad were only easements and the abutting landowners owned fee title to the land underlying this former railroad corridor). This is an important distinction considering the Supreme Court's decision in *Kershaw* regarding presumption of an easement. Therefore, based on the centerline presumption and the strip and gore doctrine, it should be presumed that the grantors of the land to the Plaintiffs in this case granted all that they owned unless a specific declaration that they intended to reserve the railroad corridor unto themselves, and they didn't.

In *Kershaw*, the defendant argued that the language in the Kershaw deed with the "exception" was similar to the facts of *Harris v. Ski Park Farms, Inc*., 120 844 P.2d 1006 (1993). The Washington Supreme Court disagreed. The court held that:

> Here, Level 3 relies on Harris, where we held that a similar exception in a deed did operate to reserve the grantor's interest in the right of way. However, Harris contained evidence of the grantor's intent to except the right of way not present here, most specifically the grantor's subsequent conveyance of the right of way to a third party and the grantor's **broker's**

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declaration that the grantor intended to reserve its interest in the right of way.

Kershaw, 126 P.3d at 26.

Defendant relies on *Roeder* and ignores *Kershaw*, which is the controlling authority. Further, the Defendant quotes *Roeder* but then takes the quote out of context. The Defendant states: "Without evidence showing that the owner of abutting property received the property from the fee owner of the right of way property, the railroad presumption is inapplicable." Def. Mot. at 8. The Washington Supreme Court's statement specifically addressed the issue because "The Davises' claim is based solely on their ownership of abutting property. Neither the location of the Davises' property **nor the deeds through which they acquired their property are included in the record before us.**" *Roeder v. Burlington Northern, Inc.*, 716 P.2d 855 (emphasis added. Here, all Plaintiffs have provided their ownership deeds and the Defendant merely attempts to misconstrue the *Roeder* opinion. Even if this Court were to accept that the Plaintiffs do not benefit from the centerline presumption, the Plaintiffs should have the opportunity to prove their claim during discovery because the facts are assumed for purposes of a 12(b)(6) motion.

IV. SAMMAMISH HOMEOWNERS HAVE STANDING UNDER UNITED STATES SUPREME COURT PRECEDENT TOO

Defendant King County argues that under the United States holding in *Hunt, Governor of North Carolina v. Washington State Apple Adverting Commission*, 432 U.S. 333, Sammamish Homeowners do not have standing to bring this action on behalf of its members. King County is wrong. Actually, under *Hunt*, Sammamish

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Homeowners absolutely have standing. In *Hunt* and subsequent Supreme Court holdings, an organization or a union representing members' interests, have standing if the individual members could assert the claim themselves. Here, the individual members of the Sammamish Homeowners could assert their individual claims against King County as provided under specific Supreme Court precedent.[4]

In *Hunt*, the Supreme Court held that the Washington State Apple Advertising Commission had standing to bring a cause of action on behalf of the Washington Apple growers to declare unconstitutional a South Carolina law regarding the grade of apples to be displayed on apples interstate. *Id.* The Court analyzed the standing issue and determined that the organization was acting in the interests of the members and that the members could have brought the claims individually.

The United States Supreme Court has addressed whether an organization has standing to bring a cause of action on behalf of its members on numerous occasions. In 1996, the Court held that a union had standing to bring an action on behalf of its union members and did not require individual participation in the action. *See United Food & Commer. Workers Union Local 751 v. Brown Group*, 517 U.S. 544 (1996). Here, just as in *United Food*, Plaintiffs seek declaratory and injunctive relief for an immediate threatened harm—King County usurping their property rights. In order to have Article II Constitutional standing, "the association must allege that its members, or any one of them are suffering immediate or threatened injury as a result of the challenged action of

[4] *See* fn. 2 *supra* referencing the simultaneous motion to amend the original complaint to add additional landowners who are also asserting their individual claims.

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the sort that would make out a justiciable case had the members themselves brought suit." *Id*. at 551.

Here, because Defendant King County claims to have greater property interests in the former railroad corridor and plans to make use of Plaintiffs' property rights that it does not own, Plaintiffs are suffering immediate and threatened injury as a result of King County's actions. A justiciable case has been established just as if the members of Sammamish Homeowners had each individually brought suit.

V. CONCLUSION

King County's Motion to Dismiss for Lack of Standing should be denied. First, all of the individually-named Plaintiffs either currently have or will have standing pursuant to the centerline presumption under Washington law such that they own fee title in the right-of-way. In addition, Sammamish Homeowners has standing for all of its members under specific precedent from the United States Supreme Court.

Date: April 13, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on the 13th day of April 2015, the foregoing was filed electronically with the Clerk of the Court to be served by the operation of the Court's electronic filing system upon all parties of record.

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