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Public Record

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February 25, 2020

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

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

Dear Ms. Brown:

Pursuant to the Board's Decision and Order served June 27, 2019, in the above-referenced proceeding, the City of Seattle is providing two Orders of the King County Superior Court issued February 11, 2020, in *City of Seattle v. Ballard Terminal Railroad Company, L.L.C.* ("BTRC"), No. 19-2-01794-5 SEA.

In the first Order, the King County Superior Court granted the City of Seattle's Second Motion for Partial Summary Judgment, filed January 3, 2020. The Superior Court held that constructing the so-called "Missing Link" (to complete the Burke-Gilman Trail) and associated relocation of the tracks at BTRC's expense as needed to accommodate the construction is authorized as a public improvement under Section 4 of the Franchise. The Superior Court also held, however, that "[t]he disputed issue of BTRC's alleged claim of interference with railroad operations, however, remains preserved and unresolved."

In the second Order, the Superior Court denied BTRC's Motion for Partial Summary Judgment -- Specific Performance and Granted the City's Cross-Motion for Partial Summary Judgment -- Specific Performance. The Superior Court held that the City's statute of limitations defense was meritorious and that, as a result, BTRC is not entitled to specific performance of the option to purchase the Locomotive Facility.

In accordance with the first Order discussed above, the parties will be conferring with the Superior Court about resolving BTRC's "alleged claim of interference with railroad operations." We will, of course, advise the Board if the Superior Court takes any action with respect to that alleged claim.

Respectfully submitted,



Michael F. McBride  
Attorney for the City of Seattle

cc (via email):

Joshua C. Allen Brower, Esq.  
Patrick J. Schneider, Esq.

The Honorable Averil Rothrock  
Hearing: January 31, 2020  
Time: 9:00 a.m.

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

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

Plaintiff

v.

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

Defendant.

No. 19-2-01794-5 SEA

ORDER DENYING DEFENDANT'S  
MOTION FOR PARTIAL SUMMARY  
JUDGMENT – SPECIFIC  
PERFORMANCE – AND GRANTING  
CITY'S CROSS MOTION

THIS MATTER came before this Court pursuant to Defendant's Motion for Partial Summary Judgment – Specific Performance. The City opposed the Motion and filed a cross motion seeking partial summary judgment. This Court considered the records and files contained herein, including the following:

1. Defendant's Motion for Partial Summary Judgment – Specific Performance;
2. Declaration of Joshua C. Allen Brower, with exhibits attached thereto;
3. Declaration of James Forgette;
4. City of Seattle's Response and Cross-Motion to Defendant's Motion for Partial Summary Judgment—Specific Performance (January 21, 2020);

ORDER DENYING DEFENDANT'S MOTION FOR  
PARTIAL SUMMARY JUDGMENT – SPECIFIC  
PERFORMANCE – AND GRANTING CROSS MOTION

1           5. Declaration of Tadas Kisielius in Support of the City of Seattle’s Response and  
2           Cross-Motion for Partial Summary Judgment—Specific Performance, with  
3           exhibits attached thereto (January 21, 2020); and

4           6. Defendant’s Reply in Support of its Motion for Partial Summary Judgment –  
5           Specific Performance.

6           The Court heard argument of counsel for the parties on January 31, 2020,<sup>1</sup> and considered  
7           that argument in conjunction with the pleadings referenced above.

8                           **I.       EVIDENTIARY ISSUE/ER 502(b)**

9           The Court recognizes BRTC’s assertion of attorney-client privilege in the Day fax (Exhibit  
10          O to the Declaration of Kisielius) and the Hansen letter (Exhibit R to the Declaration of  
11          Kisielius). Pursuant to ER 502(b), the Court finds that the disclosure of these documents was  
12          inadvertent, reasonable steps had been taken to prevent inadvertent disclosure, and BRTC  
13          promptly sought to assert its privilege when it became aware of the inadvertent disclosure. The  
14          Court does not consider this evidence.

15                          **II.       STATUTE OF LIMITATIONS DEFENSE**

16          The City made a cross motion for summary judgment seeking to dismiss BRTC’s claim on  
17          statute of limitations grounds. BRTC asserted that the City waived the statute of limitations  
18          defense by failing to plead the defense in its Reply to BRTC’s counterclaims. The Court has  
19          considered CR 8(c) and case law addressing when the failure to plead an affirmative defense results  
20          in waiver. Generally, “the affirmative defense requirement is not to be construed absolutely, [but]  
21          it will not be abrogated where it affects the substantial rights of the parties.” *Rainier National*  
22          *Bank v Lewis*, 30 Wn. App. 419, 422 (1981), citing *Mahoney v. Tingley*, 85 Wash.2d 95, 529 P.2d

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23  
24          <sup>1</sup> The City filed a Second Motion for Partial Summary Judgment, and the BRTC opposed it. The  
25          Court heard oral argument on that motion with the oral argument on Defendant’s Motion for  
26          Partial Summary Judgment – Specific Performance and the City’s cross motion, and had before  
        it all of the materials filed for both motion practices. The Court issued two separate orders  
        deciding these motions on the same day.

1 1068 (1975). The Supreme Court in *Mahoney* stated that the purpose of the waiver rule “is to  
2 avoid surprise” and that noncompliance shall be considered harmless if it does not affect  
3 substantial rights of the parties. *Mahoney, supra*, at 100. *See also Bickford v. City of Seattle*, 104  
4 Wn. App. 809, 813 (2001) (“[T]he rule’s policy is to avoid surprise and affirmative pleading is not  
5 always required.”). Here, BRTC argues that it was prejudiced because it incurred attorney fees  
6 in making its motion that it potentially would not have incurred had the City pleaded the defense.  
7 This argument does not persuade the Court that the City’s failure to plead the statute of limitations  
8 affected a substantial right of BRTC. Moreover, BRTC is *not* surprised. Its filings and arguments  
9 show that it has been well aware of potential statute of limitations defenses to the parties’ numerous  
10 claims and the facts underlying those defenses. It asserts no disadvantage due to, for example,  
11 lack of discovery on the issue. The City argues that its action to enforce the statute of limitations  
12 defense in its cross motion is action tantamount to a CR 12 motion to dismiss or a motion to amend  
13 its responsive pleading, and it has sought dismissal sufficiently in advance of trial and with no  
14 prejudice to BRTC’s substantial rights. The Court agrees. The rules are not intended to impose  
15 rigid and technical obstacles to resolution on the merits. BRTC’s substantial rights have not been  
16 affected and the failure to plead is therefore harmless. The Court will consider the statute of  
17 limitations defense.

18 As a matter of law, the statute of limitations defense is meritorious. BRTC is not entitled  
19 to specific performance of the option to purchase the Locomotive Facility.

### 20 **III. ORDER**

21 NOW, THEREFORE, it is hereby **ORDERED** that Defendant’s Motion for Partial  
22 Summary Judgment – Specific Performance is DENIED and the City’s Cross Motion for Partial  
23 Summary Judgment – Specific Performance is GRANTED.

24 DONE IN OPEN COURT this \_\_\_\_ day of \_\_\_\_\_, 2020.

25 \_\_\_\_\_  
26 Judge Averil Rothrock

ORDER DENYING DEFENDANT’S MOTION FOR  
PARTIAL SUMMARY JUDGMENT – SPECIFIC  
PERFORMANCE – AND GRANTING CROSS MOTION

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 DENYING BRTC PMSJ SPECIFIC PERF

Signed by: Averil Rothrock  
Date: 2/11/2020 9:00:00 AM

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

Judge/Commissioner: Averil Rothrock

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

Certificate Hash: 9F855AA0761CA7624EF2BC1ECCD5D60CB03F8EB5  
Certificate effective date: 11/5/2018 5:31:37 PM  
Certificate expiry date: 11/5/2023 5:31:37 PM  
Certificate Issued by: C=US, E=kcscefiling@kingcounty.gov, OU=KCDJA,  
O=KCDJA, CN="Averil Rothrock:  
njR2SwvS5hGglSP3AFk6yQ=="