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March 10, 2023

Clark County Board of Councilors
Clark County Public Service Center
1300 Franklin Street, 6th Floor
Vancouver, WA 98660

Re: Implementing SB 5517 – Freight Rail Dependent Uses – Is the last sentence in RCW 36.70A.108(2) a Poison Pill?

Dear Board of Councilors:

At the March 1, 2023 work session, the County Council requested a thorough legal analysis of the second sentence of RCW 36.70A.108(2) to determine whether this single sentence of SB 5517 is a "poison pill" that prohibits public sewer, water or other such utilities from serving Freight Rail Dependent Uses ("FRDUs") on resource lands outside urban growth areas.

We represent Portland Vancouver Junction Railroad LLC. This letter analyzes SB 5517, the legislative history and the relevant case law in Washington governing statutory interpretation.

This legal analysis is supported by the attached copy of SB 5517 and legislative history of SB 5517 from the Washington State Legislature's official website[1]:

1. Chapter 18, 2017 Laws 3rd Special Session, having been adopted by the House and Senate and signed into law by the Governor on July 6, 2017 (referred to herein as "SB 5517")

2. Original Bill introduced January 26, 2017 (referred to herein as "Original SB 5517")

3. Senate Bill Report for Senate Committee on Local Government dated as of February 6, 2017 (referred to herein as the "Senate Committee Bill Report")

4. First Engrossed SB 5517 passed by the Rules Committee on February 28, 2017 (referred to herein as "E1")

5. Bill Analysis for House Environment Committee March 21, 2017 hearing (referred to herein as the ("House Committee Bill Analysis")

[1] https://apps.leg.wa.gov/billsummary/?BillNumber=5517&Year=2017&Initiative=false

6. Second Engrossed SB 5517 passed by the Senate on June 13, 2017 (referred to herein as "E2")

7. Third Engrossed SB 5517 passed by Senate on June 27, 2017 (after having been returned by the House) and passed by House on June 29, 2017 (referred to herein as "E3")

Due to the length of this legal analysis, we are providing the following table of contents:

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EXECUTIVE SUMMARY

After careful legal analysis of the text and context of SB 5517, its legislative history and the canons of construction, our firm conclusion is that neither the second sentence of RCW 36.70A.108(2), nor any other provision of the Growth Management Act ("GMA"), prohibits sewer from serving Freight Rail Dependent Uses ("FRDUs") on resource lands outside the urban growth area.

The analysis is complex, but boiling it down to the essential points, the second sentence of RCW 36.70A.108(2) allows additional opportunities for FRDUs on "rural lands" but does not limit sewer serving FRDUs on "resource lands."

Resource lands are not a subset of "rural lands." Resource lands are an entirely separate category that is neither urban nor rural[2], and the GMA explicitly defines "rural lands" as excluding "resource lands." See RCW 36.70A.030(23) and (24); RCW 36.70A.070(5); WAC 365-196-210(27); and Clark County Comprehensive Plan 2015-2035, page 81.

In Clark County, "rural lands" consist of the rural districts set forth in UDC 40.210.020 (R-20, R-10, R-5) and the Rural Center and Rural Commercial Districts. Resource land consists of the resource districts set forth in 40.210.010 (FR-80, FR-40, AG-20, AG-WL).

FRDUs are defined in RCW 36.70A.030(13) to include both rail dependent industrial uses and "infrastructure," including "facilities" which are defined to be "both urban and rural development." This would include sewer, supporting rail dependent industrial uses.

RCW 36.70A.060(1)(a) authorizes Clark County to allow FRDUs (which, by definition includes infrastructure needed to support FRDUs) on agricultural resource land, and it does so without limitation, stating:

[2] RCW 36.70A.060(4) allows agricultural resource lands inside urban growth areas.

> "[Clark County] may adopt development regulations to assure that agriculture, forest, and mineral resource lands adjacent to short line railroads may be developed for freight rail dependent uses."

The second sentence of RCW 36.70A.108(2) states:

> "Such counties and cities may also modify development regulations to include development of freight rail dependent uses that do not require urban governmental services in rural lands."

The express language of RCW 36.70A.108(2) limits its application to "rural lands." Therefore, any restriction in RCW 36.70A.108(2) on "urban government services in rural lands" can have no applicability to FRDUs on resource lands.

RCW 36.70A.108(2) creates an opportunity for Clark County to allow FRDUs on rural lands, in addition to the opportunity to allow FRDUs on resource lands created by RCW 36.70A.060(1)(a). However, RCW 36.70A.060(1)(a) only applies to resource lands. Without RCW 36.70A.108(2), no FRDUs would be allowed on "rural lands" since no other provision of SB 5517 allows FRDUs in rural lands.

On "rural lands," RCW 36.70A.108(2) allows FRDUs that "do not require urban governmental services." However, FRDU "facilities" such as sewer are defined as "rural development." Since RCW 36.70A.108(2) is a provision solely governing multimodal transportation, this language "do not require urban governmental services in rural lands" should be interpreted to mean that public transit (an urban governmental service related to multimodal transportation) is not allowed to serve FRDUs on rural lands, but one might interpret it more broadly to mean that sewer (and other urban utilities) would not be allowed to serve FRDUs located on rural lands.

But, in either case, RCW 36.70A.108(2) is expressly limited to "rural lands," which in Clark County are limited to the rural zoning districts (R-20, R-10, R-5, RC-2.5, RC-1, CR-1 and CR-2). The definition of "rural lands" explicitly excludes resource lands. RCW 36.70A.108(2) places no restriction on "resource lands."

RCW 36.70A.060(1)(a) explicitly allows FRDUs on lands designated as resource lands (FR-80, FR-40, AG-20, AG-WL). RCW 36.70A.060(1)(a) does not include the "do not require urban governmental services" language from RCW 36.70A.108(2).

In conclusion, there is no limitation on the County's authority to allow FRDUs (defined to include infrastructure such as sewer) on resource lands under RCW 36.70A.060(1)(a). RCW 36.70A.108(2) does not apply to resource lands, only "rural lands." Resource lands are not "rural lands." Therefore, sewer is allowed to serve FRDUs on resource lands zoned FR-80, FR-40, AG-20, AG-WL.

LEGAL ANALYSIS

I. Introduction and overview of SB 5517.

We begin with an introduction and section by section overview of SB 5517. SB 5517 was passed with overwhelming majorities in both House (Yeas 82, Nays 12) and Senate (Yeas, 35 Nays 11). SB 5517 was amended three times and two committee reports were generated. This legislative history will be discussed in detail in Section II, below.

SS 5517 consists of five sections that have been codified into the Growth Management Act ("GMA") in RCW 36.70A.

A. Section 1 of SB 5517.

Section 1 of SB 5517 created a new section in the Washington statutes, which is codified in the notes to RCW 36.70A.030:

> Finding—2017 3rd sp.s. c 18: "The legislature recognizes that it enacted the rail preservation program because railroads provide benefits to state and local jurisdictions that are valuable to economic development, highway safety, and the environment. The Washington state freight mobility plan includes the goal of supporting rural economies farm-to-market, manufacturing, and resource industry sectors. The plan makes clear that ensuring the availability of rail capacity is vital to meeting the future needs of the Puget Sound region. Rail-served industrial sites are a necessary part of a thriving freight mobility system, and are a key means of assuring that food and goods from rural areas are able to make it to people living in urban areas and international markets. Planned and effective access to railroad services is a pivotal aspect of transportation planning. The legislature affirms that it is in the public interest to allow economic development infrastructure to occur near rail lines as a means to alleviate strains on government infrastructure elsewhere. Therefore, the legislature finds that there is a need for counties and cities to improve their planning under the growth management act to provide much needed infrastructure for freight rail dependent uses adjacent to railroad lines." [2017 3rd sp.s. c 18 § 1.] (Emphasis added.)

Section 1 of SB 5517 demonstrates a legislative intent of "supporting rural economies farm-to-market, manufacturing, and resource industry sectors." This language in the statement of legislative intent in Section 1 demonstrates that the legislature sought to support rail in rural areas in order to accomplish the freight mobility plan goals of "rural economies farm-to-market, manufacturing, and resource industry sectors."

Section 1 further acknowledges: "Rail-served industrial sites are a necessary part of a thriving freight mobility system, and are a key means of assuring that food and goods from rural areas are able to make it to people living in urban areas and international markets." This constitutes a legislative finding that rail-served industrial sites are essential for moving both food and goods from rural areas to urban areas.

In Section 1, the legislature "affirms that it is in the public interest to allow economic development infrastructure[3] to occur near rail lines as a means to alleviate strains on government infrastructure elsewhere [emphasis added]." There is no indication in Section 1 that the legislature intended to limit the development of "infrastructure" for economic development "near rail lines" to only urban areas[4]. Section 1 uses broad language allowing infrastructure near rail lines for economic development. There is no language in Section 1 indicating an intent to limit development of such infrastructure to just the urban area. The intent section clearly states this law is to support "rural economies," "rural areas," and "resource industry sectors."

Section 1 concludes with an express legislative finding that there is a "need" for counties to provide "much needed infrastructure for freight rail dependent uses adjacent to railroad lines." Nowhere in Section 1 is there any language indicating a legislative intent to limit such infrastructure to urban areas.

B. Section 2 of SB 5517.

Section 2 of SB 5517 amends the GMA definitions in RCW 36.70A.030 by adding new definitions of Freight Rail Dependent Uses (referred to herein as "FRDUs") and Short Line Railroad. These subsections of RCW 36.70A.030 have been renumbered since 2017 but have not been amended.

Short Line Railroad is defined in RCW 36.70A.030(26)[5] as "those railroad lines designated class II or class III by the United States surface transportation board." The Surface Transportation Board defines Class II and class III rail carriers in 49 CFR part 1201. Based on the definition of "railroad" in 49 U.S. Code § 20102 and 49 CFR subpart A, § 244.9, any spur line would be considered part of the "railroad."

Freight Rail Dependent Uses is defined in RCW 36.70A.030(13)[6] as follows:

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[3] As discussed in Section I.B, the term "infrastructure" as used in the GMA includes sewer.
[4] As discussed in section IV.B, below, the legislative history strongly supports a legislative intent to allow infrastructure to support rail dependent uses outside the urban growth area because the testimony in favor of the bill focused on the economic development need to develop rail dependent industry on resource land outside the urban growth area to create 6,500 jobs, mostly on agricultural resource lands.
[5] The subsections of RCW 36.70A.030 have been renumbered since 2017. The definition of "Short Line Railroad" was numbered RCW 36.70A.030(19) in SB 5017, but the language of this definition has not been amended.
[6] The definition of "Freight Rail Dependent Uses" was numbered RCW 36.70A.030(9) in SB 5017, but the language of this definition has not been amended.

> "Freight rail dependent uses" means buildings and other infrastructure that are used in the fabrication, processing, storage, and transport of goods where the use is dependent on and makes use of an adjacent short line railroad. Such facilities are both urban and rural development for purposes of this chapter [emphasis added].[7]

This definition of FRDUs is very important because it established what is meant by the term FRDUs in SB 5517. The definition is short but rather complex.

1. **FRDUs include both rail dependent industrial uses and "infrastructure" (*i.e.*, sewer, water and other utilities) needed for such industrial uses.**

There are two distinct components to the definition of FRDU; "buildings" and "infrastructure."

> "Freight rail dependent uses" means buildings and other infrastructure that are used in the fabrication, processing, storage, and transport of goods where the use is dependent on and makes use of an adjacent short line railroad. Such facilities are both urban and rural development for purposes of this chapter. [Emphasis added.]

This is a crucial distinction because "infrastructure" would include sewer, water and other urban facilities needed to serve rail dependent industry. Although the term "infrastructure" isn't defined in the GMA, it is commonly understood to include utilities needs to support a particular use, and other provisions of the GMA such as RCW 36.70A.215(3)(b)(i) and RCW 36.70A.217(1)(d) clarify that infrastructure includes sewer.

RCW 36.70A.215(3)(b)(i) states:

> "(i) A review and evaluation of . . . infrastructure gaps (including but not limited to transportation, water, sewer, and stormwater); and . . ."

Similarly, RCW 36.70A.217(1)(d) states:

> "(d) Infrastructure costs, including but not limited to transportation, water, sewer, stormwater . . ."

Based both on the common understanding of the term "infrastructure" and the usage of that term in other provisions of the GMA, we conclude that "infrastructure" includes sewer and

[7] Language relating to crude oil ("Freight rail dependent uses" does not include buildings and other infrastructure that are used in the fabrication, processing, storage, and transport of coal, liquefied natural gas, or "crude oil" as defined in RCW 90.56.010) is irrelevant to the issues discussed in this legal analysis and therefore has been omitted.

other utilities needed for rail dependent industrial uses. This interpretation makes sense because without adequate utilities, rail dependent industrial uses could not function.

Therefore, even though the defined term is "Freight Rail Dependent Uses," the definition of FRDUs includes both "buildings" used for rail dependent industry (*i.e.*, rail dependent "uses") and "infrastructure" used to support rail dependent industry.

When a statute defines a term, such as the definition of FRDU, courts have held that the definition controls over the plain meaning of the defined term. *Associated Press v. Wash. State Legislature*, 194 Wash. 2d 915, 926, 454 P.3d 93, 99 (2019)("However, reference to ordinary meaning here is misplaced because "[o]nly where a term is undefined will it be given its plain and ordinary meaning."), citing *United States v. Hoffman*, 154 Wn.2d 730, 741, 116 P.3d 999 (2005). Thus, since the legislature specifically defined FRDUs to include both rail dependent industrial uses and "infrastructure," that definition controls over the plain meaning of the words "Freight Rail Dependent Uses."

Based on the above analysis, anytime SB 5517 uses the term Freight Rail Dependent Uses, the legislature is actually referring to both rail dependent industrial uses and infrastructure (*i.e.*, sewer, water and other utilities) needed for such industrial uses.

2. Rail dependent industry includes "fabrication, processing, storage, and transport of goods."

The next clause of the definition of FRDUs clarifies that the types of rail dependent industrial uses allowed under the definition of FRDUs include "the fabrication, processing, storage, and transport of goods."

> "Freight rail dependent uses" means buildings and other infrastructure that are used in the fabrication, processing, storage, and transport of goods where the use is dependent on and makes use of an adjacent short line railroad. Such facilities are both urban and rural development for purposes of this chapter. [Emphasis added.]

This is important because fabrication and processing would require sewer. Under the definition of FRDU, sewer needed for fabrication or processing would itself be a type of FRDU, even though sewer isn't a type of "use" since sewer is a type of "infrastructure" that would be needed for any industrial fabrication or processing uses.

3. FDRUs must be dependent on and make use of an adjacent short line railroad.

Finally, the definition of FRDUs requires the industrial use to be dependent on and makes use of an adjacent short line railroad.

> "Freight rail dependent uses" means buildings and other infrastructure that are used in the fabrication, processing, storage, and transport of goods where the **use** is dependent on and makes use of an adjacent short line railroad. Such facilities are both urban and rural development for purposes of this chapter. [Emphasis added.]

So, in order to qualify as an FRDU, the rail dependent industry must be dependent on and make use of the railroad.

The use of the word "use" within the definition of FRDUs refers to the listed industrial uses (fabrication, processing, storage and transport of goods), not to "infrastructure." Infrastructure such as sewer isn't a separate "use." The word "use" in the FRDUs definition is refers to "the fabrication, processing, storage, and transport of goods," which are traditional types of industrial uses.

4. FRDU "facilities" are both urban and rural development.

The last sentence of the definition of FRDUs established that "Such facilities are both urban and rural development for purposes of this chapter."

> "Freight rail dependent uses" means buildings and other infrastructure that are used in the fabrication, processing, storage, and transport of goods where the use is dependent on and makes use of an adjacent short line railroad. Such facilities are both urban and rural development for purposes of this chapter. [Emphasis added.]

The reference to "this chapter" means Chapter 36.70A of the RCW, which is the Growth Management Act.

So, for the purposes of the GMA, FRDU facilities are "both" "urban" and "rural development." The term "urban" or "urban development" is not a defined term in the GMA. However, the term "rural development" is defined in RCW 36.70A.030(24) as:

> (24) "Rural development" refers to development outside the urban growth area and outside agricultural, forest, and mineral resource lands designated pursuant to RCW 36.70A.170. Rural development can consist of a variety of uses and residential densities, including clustered residential development, at levels that are consistent with the preservation of rural character and the requirements of the rural element. Rural development does not refer to agriculture or forestry activities that may be conducted in rural areas.

Therefore, although FRDUs are not specifically included in the definition of "rural development," the definition of FRDUs states that FRDU "facilities" are both urban and "rural development."

The FRDUs definition distinguishes between "uses" and "facilities." The logical conclusion is that rail dependent industrial uses are not "rural development" but rail dependent "facilities" such as sewer lines and other infrastructure needed for rail dependent industrial uses are both urban and "rural development."

C. Section 3 of SB 5517.

Section 3 of SB 5517 amends RCW 36.70A.060(1)(a) to add new language specifically allowing FRDUs on agricultural, forest and mineral resource lands:

> Any county located to the west of the crest of the Cascade mountains that has both a population of at least four hundred thousand and a border that touches another state, and any city in such county, may adopt development regulations **to assure** that agriculture, forest, and mineral resource lands adjacent to short line railroads may be developed for freight rail dependent uses. [Emphasis added].

Section 3 of SB 5517 also adopted a new section in RCW 36.70A.060(1)(e) that gives Okanogan County the same right as Clark County to "adopt development regulations to assure that agriculture, forest, and mineral resource lands adjacent to short line railroads may be developed for freight rail dependent uses."

Section 3 of SB 5517 was added to RCW 36.70A.060, which is a section entitled "Natural resource lands and critical areas—Development regulations." This section governs city and county development regulations pertaining to designated agricultural, forest and mineral resource lands.

Although Section 3 of SB 5517 uses permissive language ("may") with respect to Clark County's decision whether to adopt development regulations for FRDUs, if the County chooses to adopt such development regulations, the language used to describe the development regulations is mandatory ("to assure").

If Clark County chooses to adopt development regulations for FRDUs, Section 3 states those development regulations are "to assure that agriculture, forest, and mineral resource lands adjacent to short line railroads may be developed for" FRDUs. Since the definition of FRDUs includes rail dependent industry and "infrastructure" (including sewer) serving rail dependent industry, the express language of Section 3 of SB 5517 states that any development regulations adopted for FRDUs must "assure" that resource lands adjacent to the railroad may be developed for sewer to serve rail dependent industry.

In Clark County, there are no agricultural or forest resource lands in the urban area, and the few mineral resource lands in the urban area of Clark County are too far from the railroad to be feasibly developed for rail dependent industry[8]. For the language in Section 3 ("to assure" that agricultural, forest and mineral resource lands adjacent to the railroad may be developed for sewer to serve rail dependent industry) to have any meaning, it must apply outside the urban area.

There is no provision in Section 3 limiting the development of FRDU infrastructure to urban areas. Any interpretation that Section 3 was somehow limited to urban areas would be contrary to the plain language of Section 3. Such an interpretation would eviscerate that section, since RCW 36.70A.060(1)(a) applies specifically to resource lands in Clark County and there are no resource lands in Clark County suitable for rail dependent industry within urban areas.

D. Section 4 of SB 5517.

Section 4 of SB 5517 does not actually change any provision of the RCW or adopt any new provisions. Section 4 of SB 5517 appears to be included because previous versions of the Senate Bill included amendments to RCW 36.70A.070 that were not included in the adopted bill. The various iterations of SB 5517 will be discussed with the legislative history in Section II below.

E. Section 5 of SB 5517.

Section 5 of SB 5517 contains the language related to urban services in rural areas that some argue (incorrectly) prohibits sewer from serving FRDUs on resource lands. First, it must be noted that Section 5 only amends RCW 36.70A.108, which is a section dealing exclusively with the transportation element of the comprehensive plan.

Section 5 adds a new section to RCW 36.70A.108(2):

> (2) Any county located to the west of the crest of the Cascade mountains that has both a population of at least four hundred thousand and a border that touches another state, and any city in such county, may include development of freight rail dependent uses on land adjacent to a short line railroad in the transportation element required by RCW 36.70A.070. Such counties and cities may also modify development regulations to include development of freight rail dependent uses that do not require urban governmental services in rural lands.

The first sentence of RCW 36.70A.108(2) authorizes Clark County to "include development of freight rail dependent uses on land adjacent to a short line railroad in the "transportation element" of the comprehensive plan. The second sentence states that Clark County "<u>may</u>

[8] See the adopted Clark County Surface Mining Overlay Map.

also modify development regulations to include development of freight rail dependent uses that do not require urban governmental services in rural lands [emphasis added]." The language "may also" is permissive and indicates an intent to allow additional flexibility, not an intent to add additional restrictions.

Further, there is no provision of RCW 36.70A.108 regulating anything other than transportation. RCW 36.70A.108 is entitled: "Comprehensive plans—Transportation element—Multimodal transportation improvements and strategies" and it deals solely with transportation issues. Therefore, the reference in the second sentence of RCW 36.70A.108(2) to FRDUs that "do not require urban governmental services" may be limited to those urban services that are related to transportation, such as public transit.

However, even if RCW 36.70A.108(2) were interpreted more broadly to limit other types of "urban services" such as sewer and other utilities, the express language of RCW 36.70A.108 is limited to "rural lands." The second sentence of RCW 36.70A.108(2) states: "Such counties and cities may also modify development regulations to include development of freight rail dependent uses that do not require urban governmental services in rural lands [emphasis added]."

The term "rural lands" has specific meaning in the GMA, which regulates "rural lands" separately from "resource lands" designated for agriculture, forest or mineral resource use. In fact, as will be discussed in more detail in Section IV.B.4, below, the definition of "rural lands" in the GMA specifically excludes farm, forest and mineral resource lands. Thus, any limitation in RCW 36.70A.108(2) on sewer would be limited to "rural lands" and would not apply to agricultural, forest or mineral resource lands. For that reason, RCW 36.70A.108(2) cannot restrict sewer on "resource lands."

II. Overview of the Legislative History of SB 5517.

We have included the legislative history of SB 5517 in attachments 2 through 7 of this letter. This legislative history includes the Original Bill introduced January 26, 2017 (referred to herein as "Original SB 5517") and three amendments to SB 5517:

- First Engrossed SB 5517 passed by the Rules Committee on February 28, 2017 (referred to herein as the "First Engrossed SB 5517" or "E1")

- Second Engrossed SB 5517 passed by the Senate on June 13, 2017 (referred to herein as the "Second Engrossed SB 5517" or "E2")

- Third Engrossed SB 5517 passed by Senate on June 27, 2017 (after having been returned by the House) and passed by House on June 29, 2017 (referred to herein as the "Third Engrossed SB 5517" "E3")

The following is a brief summary of the various amendments to the Original SB 5517 as the bill moved through the legislative process:

- Original SB 5517 included a statement of legislative intent in Section 1; language relating to the number of trains vs trucks, maintenance costs, fatalities and carbon emissions was removed from Section 1 in E1. The language removed from Section 1 in E1 did not relate to sewer in rural lands or in resource lands.

- FRDUs – a new definition of Freight Rail Industrial Uses (FRDU) was added to RCW 36.70A.030(9) in the Original SB 5517, which remained unchanged in all subsequent versions and was adopted as originally written.

- Rural Character – Original SB 5517 added FRDUs to the RCW 36.70A.030(16)(b) definition of Rural Character, but this was removed in E2.

- Rural Development – Original SB 5517 added FRDUs to the RCW 36.70A.030(17) definition of Rural Development, but this was removed in E2.

- Short Line Railroad – a new definition of Short Line Railroad was added to RCW 36.70A.030(19) in the Original SB 5517, which remained unchanged in all subsequent versions and was adopted as originally written.

- RCW 36.70A.060 – E2 modified this section to limit the counties that could develop railroads under SB 5517 to effectively limit it to Clark County in RCW 36.70A.060(1)(a); E3 added Okanogan County in (1)(e).

- RCW 36.70A.070(5)(b) – E1 modified FRDUs from being a rural use to make FRDUs allowed as a rural use to achieve a variety of uses. E2 removed FRDUs from RCW 36.70A.070(5)(b).

- RCW 36.70A.108(2) – the Original SB 5517 added a new section relating to the transportation element in RCW 36.70A.108(2); this was amended in E2 to limit its application to Clark County and E2 added the word "also" to the second sentence.

The legislative history also includes two committee reports:

- Senate Bill Report for Senate Committee on Local Government dated as of February 6, 2017 (referred to herein as the "Senate Committee Bill Report")

- Bill Analysis for House Environment Committee March 21, 2017 hearing (referred to herein as the ("House Committee Bill Analysis")

The Senate Committee Bill Report analyzed the Original SB 5517 and included the following brief summary of the bill:

Brief Summary of Bill

- Authorizes cities and towns to adopt development regulations allowing agricultural, forest, and mineral resources lands adjacent to railroads to be developed for freight rail dependent uses.

- Requires the rural element of a comprehensive plan to permit freight rail dependent uses.

- Authorizes the transportation element of a comprehensive plan to include freight rail dependent uses on land adjacent to a railroad.

Senate Committee Bill Report, page 1.

The Senate Committee Bill Report also includes the following more detailed summary:

> **Summary of Bill**: Counties and cities may adopt development regulations to assure that agricultural lands, forest lands, and mineral resource lands adjacent to short line railroads may be developed for freight rail dependent uses.
>
> The rural element of the comprehensive plan must permit freight rail dependent uses. The transportation element may include development of freight rail dependent uses on land adjacent to a short line railroad. Development regulations may be modified to include development of freight rail dependent uses that do not require urban governmental services in rural lands.
>
> Freight rail dependent uses include buildings and other infrastructure that are used in the fabrication, processing, storage, and transport of goods where the use is dependent on, and makes use of, an adjacent short line railroad. Buildings and other infrastructure used in the fabrication, processing, storage, and transport of coal, liquefied natural gas, or crude oil are excluded from this definition. These facilities are both urban and rural development under the GMA.

Senate Committee Bill Report, page 2.

The Senate Bill Committee Report also discusses the testimony in favor of SB 5517 and opposition testimony from Futurewise. The testimony in favor of SB 5517 included a discussion of four key projects for agricultural processing and manufacturing in Clark County that could add up to 6,500 jobs, as well as an acknowledging the difficulty of de-designating under-used

agricultural lands for industrial development under the GMA and a suggestion that "this problem can be fixed by this legislation." Senate Committee Bill Report, page 3.

The opposition testimony from Futurewise focused on concerns about the loss of agricultural lands and the creation of 6,500 jobs without adequate urban services. Senate Committee Bill Report, page 3.

The House Committee Bill Analysis analyzed the First Engrossed SB 5517 and included the following brief summary of the bill:

Brief Summary of Engrossed Bill

- Adds definitions of "freight rail dependent uses" and "short line railroad" to the Growth Management Act, and provides that railroad tracks and freight rail dependent uses are included within the definitions of "rural development" and "rural character."

- Authorizes the inclusion of freight rail dependent uses within the rural element of a county's comprehensive plan.

- Authorizes counties and cities to adopt development regulations to assure that agricultural, forest, and mineral resource lands adjacent to short line railroads may be developed for freight rail dependent uses.

- Provides that the transportation element of a comprehensive plan, and development regulations adopted in accordance with the comprehensive plan, may include development of freight dependent uses on land adjacent to a short line railroad.

House Committee Bill Analysis, page 1.

The second bullet point in the Senate Committee Bill Report of the Original SB 5517 "requires" the rural element of the comprehensive plan to permit FRDUs, but this was changed in the First Engrossed SB 5517, and the House Committee Bill Analysis notes that E1 merely "authorizes" FRDUs in the rural element of the comprehensive plan. Subsequently, the reference to FRDUs in the GMA provisions governing the rural element of the was deleted in E2, but the provisions relating to resource lands remained.

The House Committee Bill Analysis includes the following detailed summary of the First Engrossed SB 5517:

Summary of Bill:

Rail Uses and Railroads.

Two definitions are added to the GMA:

1. "Freight rail dependent uses" means buildings and other infrastructure that are used in the fabrication, processing, storage, and transport of goods where the use is dependent on and makes use of an adjacent short line railroad. Such facilities are both urban and rural development for purposes of the GMA.

2. "Short line railroads" means those railroad lines designated Class II or Class III by the STB.

Additionally, railroad tracks and freight rail dependent uses are included within the GMA's definitions of "rural development" and "rural character."

Natural Resource Lands.

Counties and cities are authorized to adopt development regulations to assure that agriculture, forest, and mineral resource lands adjacent to short line railroads may be developed for freight rail dependent uses.

Comprehensive Plans.

The rural element of a county's comprehensive plan may provide for freight rail dependent uses in rural areas.

The transportation element of a comprehensive plan may include development of freight dependent uses on land adjacent to railroad lines and infrastructure.

Development regulations may be modified to include development of freight rail dependent uses.

House Committee Bill Analysis, page 4.

III. Overview of Washington Case Law on Statutory Interpretation.

The fundamental purpose of statutory interpretation is to determine the legislature's intent. *Whatcom County v. W. Wash. Growth Mgmt. Hr'gs Bd*., 186 Wash. 2d 648, 667, 381 P.3d 1, 8 (2016) ("Our fundamental purpose in statutory interpretation is to ascertain and discern the legislature's intent"), citing *Dep't of Ecology v. Campbell & Gwinn*, LLC, 146 Wn.2d 1, 9, 43 P.3d 4 (2002). In the *Whatcom County* case, the court explained:

> The court discerns legislative intent from the plain language enacted by the legislature, considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole.

Whatcom County, 186 Wash. 2d at 667, citing *Campbell & Gwinn*, 146 Wn.2d at 9-19.

Only if the statute is ambiguous—that is, "susceptible to more than one reasonable meaning"—does the court look at legislative history or the statutory rules of construction. *Associated Press v. Wash. State Legislature*, 194 Wash. 2d 915, 920, 454 P.3d 93, 96 (2019), citing *Campbell & Gwinn*, 146 Wn.2d at 9-12; *Mason v. Ga.-Pac. Corp*., 166 Wash. App. 859, 863-64, 271 P.3d 381, 383 (2012).

A. Permissible Legislative History.

Legislative history consists of committee reports and other contemporaneous records of proceedings. The key here is that to be relied on as "legislative history," the records of the legislative process must have been contemporaneously created as part of the legislative process.

The post-enactment testimony or recollections of individual legislators or others involved in the legislative process is not considered legislative history and will not be admitted by a court for the purposes of interpreting a statute. *Yakima v. Int'l Ass'n of Fire Fighters, Local 469*, 117 Wash. 2d 655, 677, 818 P.2d 1076, 1087 (1991) ("The affiant's statements regarding legislative intent are inadmissible, it being well settled that the Legislature's intent in passing a particular bill cannot be shown by the affidavit of a legislator"); *Woodson v. State*, 95 Wash. 2d 257, 264, 623 P.2d 683, 685 (1980) (" Legislative intent in passing a statute cannot be shown by depositions and affidavits of individual state legislators, however"), citing *Pannell v. Thompson*, 91 Wn.2d 591, 598, 589 P.2d 1235 (1979); *Spokane v. State*, 198 Wash. 682, 687, 89 P.2d 826, 37 A.L.R. 927 (1939).

At the work session, Councilor Marshall based her understanding of SB 5517 on discussions with people who were involved in the adoption of SB 5517, including legislators who voted on the bill, who would presumably testify the intent of RCW 36.70A.108(2) was to prohibit sewer outside of urban areas. Undoubtedly, other legislators involved with adoption of SB 5517 would testify to the opposite.[9] However, based on the well-established case law cited above, there is no legal relevance to the testimony of individual legislators or others involved in the adoption of SB 5517, and courts will not even admit such testimony.

Therefore, we will not consider the opinions or recollections of legislators or anyone else involved in the adoption of SB 5517 in our legal analysis of SB 5517.

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[9] In late 2017 or early 2018, the undersigned had conversations with Representative Liz Pike, who voted on SB 5517. Representative Pike stated unequivocally that SB 5517 was intended to allow FRDUs, including the sewer needed to serve such rail dependent industry, outside urban areas.

Courts have consistently rejected attempts at discerning legislative intent through the post-enactment recollections of those involved in the legislative process. As the court explained:

> Finally, Viewcrest offered the trial court legislative history in the form of a declaration from one of four attorneys who drafted the Condominium Act. The legislature's intent in passing a particular bill cannot be shown by the affidavit of a legislator. The same rule applies to postenactment affidavits and declarations by the legislation's drafter, other legislators, by legislative counsel and staff who participated in developing the legislation, by lobbyists, and by other interested parties. On de novo review, we reject the declaration.

Viewcrest Condo. Ass'n v. Robertson, 197 Wash. App. 334, 345, 387 P.3d 1147, 1152 (2016).

B. Canons of Construction.

In addition to legislative history, courts rely on rules of interpretation known as the "canons of construction" to discern legislative intent of an ambiguous statute. Courts refer to the "canons of construction" as if there were an exhaustive list of well-established rules neatly written down in a book somewhere that anyone could pick up and read. However, the reality is that there is no complete list of the "canons of construction." Some are more established than others, and courts are free to adopt new "canons" at any time or reject old ones for any reason that the court finds persuasive at the time.

It is difficult to find a reported case explaining how the "canons of construction" were originally established, but one unreported opinion explained the genesis of the canons as follows:

> Canons of construction are merely statements of judicial preferences for the resolution of a particular problem. They are based on common human experience and are designed to achieve what the court believes to be the "normal" result for the problem under consideration.

Henak v. Whitcombe, NO. 39547-5-I, 1998 Wash. App. LEXIS 660, at *10-11 (Ct. App. Apr. 27, 1998).

Although there a few reported cases explaining how the canons of construction were established and no reported case attempts to list out all known canons, there are numerous reported cases discussing individual canons. Some of the most relevant of these are summarized below, although the list of canons discussed in this legal analysis is by no means exhaustive.

1. Conflicting provisions should be harmonized to give effect to all the language used in the statute.

Perhaps the most often cited canon is that conflicting provisions should be harmonized to give effect to all language used in the statute. *Mason v. Ga.-Pac. Corp.*, 166 Wash. App. 859, 863-64, 271 P.3d 381, 383 (2012) ("We consider and harmonize statutory provisions in relation to each other and interpret a statute to give effect to all statutory language), citing *King County v. Cent. Puget Sound Growth Mgmt. Hearings Bd.*, 142 Wn.2d 543, 560, 14 P.3d 133 (2000).

The court explained this canon as follows:

> Historically, this Court has followed the rule that each provision of a statute should be read together with other provisions in order to determine legislative intent. "The purpose of reading statutory provisions *in pari materia* with related provisions is to determine the legislative intent underlying the entire statutory scheme and read the provisions 'as constituting a unified whole, to the end that a harmonious, total statutory scheme evolves which maintains the integrity of the respective statutes.'"

In re Estate of Kerr, 134 Wash. 2d 328, 335-36, 949 P.2d 810, 814 (1998).

2. Courts don't rewrite statutes; every word has meaning.

A related canon is that courts don't rewrite statutes. Courts neither add nor subtract words. Every word has meaning. As the Washington Supreme Court explained:

> A legislative body is presumed not to have used superfluous words. Courts are bound to accord meaning, if possible, to every word in a statute. *State v. Lundquist*, 60 Wn.2d 397, 403, 374 P.2d 246 (1962) (citing *Group Health Coop. v. King Cy. Med. Soc'y*, 39 Wn.2d 586, 637, 237 P.2d 737 (1951)).
>
> In construing a statute, it is always safer not to add to, or subtract from, the language of the statute unless imperatively required to make it a rational statute. *McKay v. Department of Labor & Indus.*, 180 Wash. 191, 194, 39 P.2d 997, 98 A.L.R. 990 (1934); *State v. Taylor*, 97 Wn.2d 724, 728, 649 P.2d 633 (1982); *State v. Edwards*, 104 Wn.2d 63, 67-68, 701 P.2d 508 (1985). The general rule is that
>
> > [c]ourts must . . . construe statutes as they are written. They may not rewrite them to suit their views of what they think

> the statutes ought to say or to avoid difficulties in construing and applying them.
>
> *Arkansas Oak Flooring Co. v. Louisiana & Ark. Ry*., 166 F.2d 98, 101 (5th Cir.), cert. denied, 334 U.S. 828 (1948).

Applied Indus. Materials Corp. v. Melton, 74 Wash. App. 73, 79, 872 P.2d 87, 91 (1994).

3. Strained Consequences and absurd results should be avoided.

Another related canon that is often cited together with the canon requiring provisions to be harmonized is the canon that strained consequences and absurd results should be avoided. *Mason v. Ga.-Pac. Corp*., 166 Wash. App. 859, 863-64, 271 P.3d 381, 383 (2012) ("We avoid construing a statute in a manner that results in "unlikely, absurd, or strained consequences"), citing *Glaubach v. Regence BlueShield*, 149 Wn.2d 827, 833, 74 P.3d 115 (2003).

A recent court of appeals opinion stated this canon thusly:

> A frequently repeated maxim of statutory construction is that "statutes should receive a sensible construction to effect the legislative intent and, if possible, to avoid unjust and absurd consequences."

In re Postsentence Review of Hardy, 9 Wash. App. 2d 44, 49-50, 442 P.3d 14, 18 (2019), citing *State v. Vela*, 100 Wn.2d 636, 641, 673 P.2d 185 (1983).

4. Preference is given a more specific statute only if the two statutes deal with the same subject matter and conflict to such an extent that they cannot be harmonized.

Another canon states that preference is given a more specific statute only if the two statutes deal with the same subject matter and conflict to such an extent that they cannot be harmonized. *In re Estate of Kerr*, 134 Wash. 2d 328, 335-36, 949 P.2d 810, 814 (1998).

5. When a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions.

There is a canon of construction known as *expressio unius* operates under the principal of "negative implication" because of the negative implication that all omissions should be understood as exclusions when a statute designates or allows certain things. As the court of appeals recently explained:

> Under the interpretive canon of *expressio unius est exclusio alterius*, there arises a negative implication that "'when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions.'" *Copeland v.*

> *Ryan*, 852 F.3d 900, 907 (9th Cir. 2017) (quoting *Boudette v. Barnette*, 923 F.2d 754, 757 (9th Cir. 1991)). Therefore, in listing water rights, surface rights, and interests in land in § 5108, and subsequently stating that "title to lands or rights acquired under the Act" are exempt from federal and state taxation, Congress indicated that the exemption applied to the rights and interests listed in § 5108 and not to additional, undefined rights.

Sifferman v. Chelan Cty., 19 Wash. App. 2d 631, 657, 496 P.3d 329, 342 (2021). However, the Washington Supreme Court has cautioned against rigidly applying a negative implication to defeat the intention of the legislature:

> Because the emergency clause declares that only section 2 is necessary, intervenor-respondents claim the statutory construction rule *expressio unius est exclusio alterius* (express mention of one implies exclusion of all others) applies to EHB 2901 and therefore the remainder of the act is subject to referendum. See *Kreidler v. Eikenberry*, 111 Wn.2d 828, 835, 766 P.2d 438 (1989). However, this maxim "cannot be rigidly applied to . . . defeat the intent of the legislature." *State v. Williams*, 94 Wn.2d 531, 538, 617 P.2d 1012 (1980). In *Amalgamated Transit Union Legislative Council v. State*, the court indicated that the rule of *expressio unius est exclusio alterius* did not necessarily apply without considering other factors which may persuade the court that legislative intent was the opposite of what the statutory construction rule would require. *Amalgamated Transit Union Legislative Council v. State*, 145 Wn.2d 544, 552-57, 40 P.3d 656 (2002) (where certain statutes are explicitly repealed by a new law, a statute that was not explicitly repealed is not repealed by implication where factors, such as legislative history and an attorney general opinion, were not sufficient to show legislative intent was to repeal the statute).

Wash. State Labor Council v. Reed, 149 Wash. 2d 48, 58-59, 65 P.3d 1203, 1209 (2003) (emphasis added).

6. The ordinary meaning of words as defined in the dictionary is used, unless the term is defined in the statute.

There are a number of canons relating to grammar, punctuation and the use of dictionaries to define words that are not defined in the statute. In general, courts follow ordinary rules of

punctuation and grammar, and they rely on dictionaries to define terms that are not defined in statute. *Kitsap County v. Allstate Insurance Co.,* 136 Wash.2d 567, 964 P.2d 1173 (1998).[10]

However, dictionary definitions do not apply when the term is defined by statute. *Associated Press v. Wash. State Legislature*, 194 Wash. 2d 915, 926, 454 P.3d 93, 99 (2019) ("[o]nly where a term is undefined will it be given its plain and ordinary meaning"), citing *United States v. Hoffman*, 154 Wn.2d 730, 741, 116 P.3d 999 (2005).

7. The word "may" is permissive and does not create a duty.

Perhaps the most relevant of the canons relating to word usage is the canon holding that the word "may" is permissive and does not create any type of duty or obligation. *Elec. Contr. Ass'n v. Riveland*, 138 Wash. 2d 9, 28, 978 P.2d 481, 490 (1999) ("the statute's express use of the term 'may' is permissive and does not create a duty"), citing *Yakima County (W. Valley) Fire Protection Dist. No. 12 v. City of Yakima,* 122 Wn.2d 371, 381, 858 P.2d 245 (1993) (the term "may" in a statute has a permissive or discretionary meaning).

IV. Legal Analysis: Is RCW 36.70A.108(2) a Poison Pill?

Having set the stage with an overview of SB 5517, its legislative history and the legal framework Washington courts used to interpret statutes, we now turn to the legal analysis to answer the question whether the second sentence in RCW 36.70A.108(2) is a poison pill that precludes development of sewer on agricultural and forest resource lands outside the urban growth area.

Based on the framework for interpreting statutes outlined above, the first step in the legal analysis is to analyze the language enacted by the legislature, "considering the text of the provision in question, the context of the statute in which the provision is found, related provisions, amendments to the provision, and the statutory scheme as a whole." *Whatcom County*, 186 Wash. 2d at 667.

Only if the provision remains ambiguous after a thorough textual analysis, is it permissible to examine the legislative history or resort to the canons of construction. *Associated Press*, 194 Wash. 2d at 920. A statute is ambiguous if it is "susceptible to more than one reasonable meaning."

A. Legal Analysis of Text and Context of SB 5517.

We begin at the beginning with Section 1 of SB 5517. The text of Section 1 of SB 5517 is set forth in Section I of this letter together with an overview of SB 5517. Now we will drill down into the language of SB 5517 to reach a firm conclusion about its proper interpretation.

Section 1 of SB 5517 says nothing about limiting or restricting sewer or other urban services outside the urban growth boundary.

[10] *Kitsap County v. Allstate Insurance* is notable for its reliance on seven different dictionaries to determine the plain and ordinary meaning or words.

On the contrary, the legislative findings in Section 1 of SB 5517 offer a full throated statement of legislative intent to support rural economies and "resource industry sectors." In the same breath, the legislature expressly affirmed its support for "much needed infrastructure for freight rail dependent uses adjacent to railroad lines."

Section 1 of SB 5517 contains the legislative findings, rather than the governing language of the substantive provisions of the bill, so it doesn't control. However, these legislative findings provide good guidance on how the substantive provisions of SB 5517 should be interpreted.

Turning to the controlling provisions of SB 5517, Section 2 of SB 5517 contains the controlling definition of Freight Rail Dependent Uses:

> "Freight rail dependent uses" means buildings and other infrastructure that are used in the fabrication, processing, storage, and transport of goods where the use is dependent on and makes use of an adjacent short line railroad. Such facilities are both urban and rural development for purposes of this chapter.

As discussed in Section I.B of this letter, the definition of FRDUs in RCW 36.70A.030(13) is complex. Based on the analysis in Section I.B and the express language of RCW 36.70A.030(13), we conclude that FRDUs have two distinct meanings and depending on the context could refer to either infrastructure (*i.e.*, sewer, water and other utilities) or rail dependent industrial uses (fabrication, processing, storage, and transport of goods).

This interpretation is supported by the language of the definition, which refers separately to "buildings" and "infrastructure." However, the stronger support for this interpretation can be found in the next clause of the definition, which employs the word "use" (twice) as contrasted from the word "facilities" in the last sentence.

The FRDUs definition states that FRDUs are "used in the fabrication, processing, storage, and transport of goods where the use" is rail dependent. In both instances, the word "use" or "used" is referring to the "fabrication, processing, storage, and transport of goods," which are traditional industrial uses.

However, the first clause in the definition refers to buildings and "infrastructure." Neither buildings nor infrastructure are "uses." They are "facilities," which, as discussed in the last sentence, are considered both urban and rural. "Uses" occur within and outside of buildings, and infrastructure is necessary for those buildings to function properly (*i.e.*, without infrastructure such as sewer, the toilets in the buildings won't flush and there is no place to drain industrial wastewater).

Based on the above analysis, the term Freight Dependent Industrial Uses is a bit of a misnomer since it primarily refers to "facilities" (buildings and infrastructure) rather than "uses." But those facilities only qualify as FRDUs depending on how they are used. In other words, to qualify as

FRDUs, the buildings and infrastructure must be "used in the fabrication, processing, storage, and transport of goods where the use" is rail dependent.

If the "use" meets this test, then the "facilities" (including both the buildings and infrastructure) qualify as FRDUs, and any such facilities are considered both urban and rural.

The sentence in the definition stating "Such facilities are both urban and rural development" indicates an intent not to specifically categorize infrastructure supporting rail dependent industry as either urban or rural, but instead such facilities are considered to be "both" rural and urban. This further supports an interpretation that sewer may be developed to support rail dependent industry in urban and rural areas. Urban facilities undoubtedly include sewer under the GMA.

The next section of SB 5517 (Section 3) contains the operative language, which was added to RCW 36.70A.060(1)(a)[11]:

> Any county located to the west of the crest of the Cascade mountains that has both a population of at least four hundred thousand and a border that touches another state, and any city in such county, may adopt development regulations to assure that agriculture, forest, and mineral resource lands adjacent to short line railroads may be developed for freight rail dependent uses.

RCW 36.70A.060 governs city and county development regulations pertaining to designated agricultural, forest and mineral resource lands. The new language added by SB 5517 expressly authorizes Clark County "to adopt development regulations <u>to assure</u> that agriculture, forest, and mineral resource lands adjacent to short line railroads may be developed for freight rail dependent uses [emphasis added]."

This language is plain, unambiguous, and without limitation. If SB 5517 ended here, there would be no question that SB 5517 authorized Clark County to amend its development regulations to authorize sewer outside the urban growth area for the sole purpose of providing sewer to support rail dependent industry adjacent to the County's short line railroad.

FRDUs adjacent to the County's short line railroad are expressly allowed on resource lands by RCW 36.70A.060(1)(a). Although agricultural and forest land are allowed to be designated inside urban growth areas per RCW 36.70A.060(4)[12], Clark County has not designated any agricultural or forest resource lands within its urban growth area[13]. FRDUs are expressly defined to include "infrastructure" (*i.e.*, sewer) that is used to support rail dependent industry.

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[11] As mentioned in Section I.C of this letter, a similar provision was added to RCW 36.70A.060(1)(e) to allow FRDUs on resource lands in Okanogan County.

[12] Resource lands cannot be a subset of rural lands. If resource lands were a subset of rural lands, resource lands could not be allowed within the urban growth areas per RCW 36.70A.060(4).

[13] Based on the adopted Surface Mining Overlay Map, the only mineral resource lands in Clark County's urban areas are too far from the rail line to be considered "adjacent."

There is no ambiguity in RCW 36.70A.060(1)(a). It expressly authorizes Clark County to amend its development regulations to, not merely allow, but to "assure" that sewer for rail dependent industry can be developed on agricultural resource lands adjacent to the County's short line railroad, which only exist outside the urban growth area.

So, the question then becomes, whether the second sentence in RCW 36.70A.108(2) in Section 5 of SB 5517, is a "poison pill" that completely vitiates the express authorization of the provision Section 3 added to RCW 36.70A.060(1)(a).

The second sentence of RCW 36.76A.108(2) states:

> "Such counties and cities may also modify development regulations to include development of freight rail dependent uses that do not require urban governmental services in rural lands.[14]"

At first blush, the second sentence of RCW 36.70A.108(2) merely provides additional authority to authorize the County to modify development regulations to allow certain types of FRDUs "in rural lands."

There is no language in RCW 36.76A.108(2) that operates as any type of restriction. The sentence begins with "may also" and ends with "do not require." There is no prohibition to be found in RCW 36.70A.108(2). It is merely an additional authorization for Clark County to modify development regulations to include FRDUs that do not require urban services in rural lands.

Nothing in RCW 36.76A.108(2) expressly limits the broad authority provided by RCW 36.70A.060(1)(a) for Clark County to adopt development regulations "to assure" development of FRDUs on resource lands.

In late 2017 or early 2018, former Clark County Deputy Prosecutor Chris Horne advised the former Chair of the Board of County Councilors Eileen Quiring that RCW 36.70A.108(2) creates a "negative implication" that what is not expressly allowed by RCW 36.70A.108(2) is prohibited.[15] Based on that, Mr. Horne advised that extension of sewer outside the urban growth area to support FRDUs was prohibited. This advice likely led to the stalling out of the railroad industrial area in 2018.

However, Mr. Horne's analysis was incorrect for a number of reasons. First, the negative implication that what is not expressly allowed is prohibited is a canon of construction known as of *expressio unius est exclusio alterius* that is discussed in Section III.B.4, above.

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[14] Unlike the amendments to RCW 36.70A.060(1), which authorize FRDUs in both Clark County and Okanogan County, RCW 36.70A.108(2) applies only to Clark County.

[15] The undersigned was at a meeting in late 2017 or early 2018 with Chris Horne, Councilor Quiring, former House Representative Liz Pike and other members of County staff where Mr. Horne advised Councilor Quiring and County staff that the "negative implication" from RCW 36.70A.108(2) superseded the broad grant of authority in RCW 36.70A.060(1)(a) and acted as a complete bar to sewer outside the urban growth area.

It is well established that courts are not supposed to resort to canons of construction unless it has first been established that the language at issue is ambiguous (has more than one meaning). The only way to create such ambiguity is by first applying the canon of construction to create a negative implication. Since SB 5517 is not ambiguous on its face, there should be no need to resort to canons of construction.

Nevertheless, we shall drill deeper into the text and context of SB 5517 to determine whether there is any ambiguity that might trigger the need to resort to canons of construction.

1. Section 5 of SB 5517 Amended the RCW Governing the Transportation Element of the Comprehensive Plan.

Section 5 of SB 5517 adds a new section to RCW 36.70A.108(2):

> (2) Any county located to the west of the crest of the Cascade mountains that has both a population of at least four hundred thousand and a border that touches another state, and any city in such county, may include development of freight rail dependent uses on land adjacent to a short line railroad in the transportation element required by RCW 36.70A.070. Such counties and cities may also modify development regulations to include development of freight rail dependent uses that do not require urban governmental services in rural lands.

RCW 36.70A.108 is entitled: "Comprehensive plans—Transportation element—Multimodal transportation improvements and strategies." RCW 36.70A.108 deals exclusively with multimodal transportation improvements and strategies that may be included in the transportation element of the comprehensive plan. There is no provision of RCW 36.70A.108 regulating anything other than the transportation element of the comprehensive plan.

RCW 36.70A.108(2) refers to "urban governmental services." The term "urban governmental services" is defined in RCW 36.70A.030(27) as:

> (27) "Urban governmental services" or "urban services" include those public services and public facilities at an intensity historically and typically provided in cities, specifically including storm and sanitary sewer systems, domestic water systems, street cleaning services, fire and police protection services, public transit services, and other public utilities associated with urban areas and normally not associated with rural areas.

The definition of urban services includes sewer but, it also includes other types of urban services including transportation related services such as street cleaning and public transit. Public transit is a prime example of a "multimodal" transportation.

Although the term "multimodal" is not defined in the GMA, the implementing rules adopted by the Department of Commerce define "multimodal" for the purposes of RCW 36.70A.108 as "the four major modes of travel (auto, public transportation, bicycle, and pedestrian)." WAC 365-196-840(4)(b). Thus, public transit is a type of urban governmental service that is also "multimodal" within the meaning of RCW 36.70A.108.

Since RCW 36.70A.108 is limited to regulating development of multimodal transportation in the transportation element of the comprehensive plan, and public transit is a type of multimodal transportation that is also an "urban governmental service," the second sentence of RCW 36.70A.108(2) can be interpreted to authorize Clark County to adopt development regulations allowing FRDUs that do not require public transit to be extended into rural lands. This could be a legitimate concern because the railroad would serve the freight needs of FRDUs, but not necessarily the transportation needs of the 6,500 anticipated employees.

The fact that FRDU "facilities" are defined to be both urban and "rural development" supports this interpretation, since sewer would be a type of FRDU facility that is also "rural development" and "rural development" is expressly allowed on rural lands by RCW 36.70A.070(5)(b). Public transit would not be an FRDU facility because public transit would serve the 6,500 anticipated employees, and would not be directly "used in the fabrication, processing, storage, and transport of goods" per the FRDU definition in RCW 36.70A.030(13).

Thus, to the extent RCW 36.70A.108(2) is construed as a limitation, the limitation would be on extending public transit into rural lands to serve employees of FRDUs located on resource lands per RCW 36.70A.060(1)(a). This interpretation harmonizes the language in RCW 36.70A.108(2) with the definition of FRDU in RCW 36.70A.030(13) and respects the placement of RCW 36.70A.108(2) in a section of the RCW that exclusively governs multimodal transportation improvements and strategies in the transportation element of the comprehensive plan.

2. Section 5 of SB 5517 is limited to "rural lands."

Further, even if RCW 36.70A.108(2) could be interpreted to apply more broadly to other types of "urban services" besides public transit, the express language of RCW 36.70A.108 is limited to "rural lands." The second sentence of RCW 36.70A.108(2) states: "Such counties and cities may also modify development regulations to include development of freight rail dependent uses that do not require urban governmental services in **rural lands** [emphasis added]."

Thus, any limitation in RCW 36.70A.108(2) would strictly be limited to "rural lands." The GMA defines "rural lands" separately from "resource lands" designated for agriculture, forest or mineral resource use. The term "rural lands" is expressly defined to exclude "resource lands." Therefore, RCW 36.70A.108(2) can have no applicability to sewer on "resource lands," because RCW 36.70A.108(2) only applies to "rural lands."

We reviewed several relevant provisions of the GMA and its implementing rules adopted by the Department of Commerce as well as the Clark County Comprehensive Plan to make the determination that the term "rural lands" excludes "resource lands."

RCW 36.70A.030(24) specifically defines "rural development" to only include development in areas outside of urban areas that are also "outside agricultural, forest, and mineral resource lands."

RCW 36.70A.030(23) defines "rural character" by reference "to the patterns of land use and development established by a county in the rural element of its comprehensive plan [emphasis added]." The rural element of the comprehensive plan is expressly limited by RCW 36.70A.070(5) to rural "lands that are not designated for urban growth, agriculture, forest, or mineral resources [emphasis added]." Therefore, lands designated for "agriculture, forest or mineral resources" are by definition not "rural lands," within the meaning of GMA. They are "resource lands."

This is confirmed by the Clark County Comprehensive Plan, which has a section dealing with "rural lands" and a separate section dealing with "resource lands." The Comprehensive Plan specifically defines "rural lands" to exclude resource lands:

> "As defined by WAC 365-195-210(19), rural lands are those areas which lie outside of urban growth areas and do not include designated long-term resource lands (agriculture, forest or mineral resources)."

Clark County Comprehensive Plan 2015-2035, Rural and Natural Resource Element-81. The WAC section referenced in the comprehensive plan has been renumbered but still exists in the WAC as WAC 365-196-210(27):

> (27) "Rural lands" means all lands which are not within an urban growth area and are not designated as natural resource lands having long-term commercial significance for production of agricultural products, timber, or the extraction of minerals.

Thus, the term "rural lands" used in RCW 36.70A.108(2) is a defined term both in GMA and in the Washington Administrative Code, as well as Clark County's Comprehensive Plan, as lands that are outside of urban areas but NOT designated as resource lands for farm, forest, and mineral resources.

Since GMA specifically defines "rural lands" as not including those that are designated for "agriculture, forest, or mineral resources," any limitation on sewer in "rural lands" imposed by RCW 36.70A.108(2) would have no applicability to sewer for rail dependent industry located on "resource lands" designated "agriculture, forest, or mineral resources," as expressly authorized by RCW 36.70A.060(1)(a).

This interpretation is confirmed by the plain language of RCW 36.70A.060(1)(a):

> Any county located to the west of the crest of the Cascade mountains that has both a population of at least four hundred thousand and a border that touches another state, and any city in such county, may adopt development regulations to assure that agriculture, forest, and mineral resource lands adjacent to short line railroads may be developed for freight rail dependent uses.

RCW 36.70A.060(1)(a) applies specifically to the "development regulations" applicable to FRDUs on "resource lands" in Clark County. There is no limitation in RCW 36.70A.060(1)(a) (or anywhere else in SB 5517 or the GMA) on the types of urban services allowed to support rail dependent industry on "resource lands." RCW 36.70A.108(2) cannot be construed to prohibit sewer on resource lands because RCW 36.70A.108(2) only mentions "rural lands." Resource lands are simply NOT "rural lands" as those terms are defined in the GMA.

Although there are no cases interpreting SB 5517, there are cases interpreting RCW 36.70A.110(4), which is one of only two[16] other GMA provisions relating to sewer in rural areas. RCW 36.70A.110 is entitled "Comprehensive plans—Urban growth areas" and it governs the obligations of cities and counties when planning for urban areas.

With respect to sewer, RCW 36.70A.110(4) states:

> "(4) In general, cities are the units of local government most appropriate to provide urban governmental services. In general, it is not appropriate that urban governmental services be extended to or expanded in rural areas except in those limited circumstances shown to be necessary to protect basic public health and safety and the environment and when such services are financially supportable at rural densities and do not permit urban development."

This provision has been interpreted by the Washington Supreme Court, which held that RCW 36.70A.110 prohibited sewer from serving "rural areas" unless the County could show that the sewer was necessary to protect basic public health, safety and the environment, that the sewer was financially supportable at rural densities, and the sewer would not permit urban development. *Thurston Cty. v. Cooper Point Ass'n*, 148 Wash. 2d 1, 10-11, 57 P.3d 1156, 1161 (2002).

In reaching this conclusion, the court analyzed the definition of "rural area" for the purpose of the sewer limitations in RCW 36.70A.110(4):

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[16] Sewer is also allowed in rural areas that qualify as LAMIRDs per RCW 36.70A.070(5):

"(d) Limited areas of more intensive rural development. Subject to the requirements of this subsection and except as otherwise specifically provided in this subsection (5)(d), the rural element may allow for limited areas of more intensive rural development, including necessary public facilities and public services to serve the limited area as follows:"

> B. Is the Cooper Point peninsula a "rural" area for the purpose of RCW 36.70A.110(4)?
>
> County contends, additionally, that RCW 36.70A.110(4)'s development restrictions do not prohibit the development of the proposed sewer line because the "record clearly shows that the area intended to benefit from the four inch, limited capacity sewer line is not rural in nature." Pet. for Review at 10. The thrust of County's argument on this point is that because Tamoshan and Beverly Beach are quasi-urbanized pre-GMA communities that are located in an area that has since been designated rural, the statute is inapplicable since it has application only to "governmental services . . . in rural areas." RCW 36.70A.110(4). In support of its argument, County points out that although the Board applied RCW 36.70A.110(4)'s development restrictions, even it recognized that Tamoshan and Beverly Beach support "'urban densit[ies].'" Admin. R. (AR) at 949.
>
> As we have observed above, County, in accord with the GMA's rural designation provision, RCW 36.70A.070(5), specifically designated the Cooper Point peninsula, including Tamoshan and Beverly Beach, as "rural" when drafting its comprehensive plan. AR at 463. Although we believe that this is telling evidence that the area is "rural" for purposes of the GMA, the record also establishes that "[f]uture land use [on Cooper Point] is anticipated to remain rural and residential in character." AR at 481. Indeed, the record shows that the nearest urban growth area (UGA) 5 is located significantly to the south of the area at issue and that there are no proposals to extend the UGA northward to include Cooper Point. It is also apparent from the record that the Cooper Point area has considerable open area where the natural vegetation has remained relatively undisturbed. This lack of encroachment on nature is a characteristic, according to the GMA, that is associated with a "rural" area where, among other things, "open space, the natural landscape, and vegetation predominate over the built environment." RCW 36.70A.030(14)(a). Because the Cooper Point area has characteristics consistent with the GMA's definition of "rural" and has been designated "rural" within County's comprehensive plan, we conclude that it is "rural" within the meaning of the GMA.

Cooper Point, 148 Wash. 2d at 10-11, 57 P.3d at 1161.

In analyzing whether Cooper Point was a "rural area" within the meaning of RCW 36.70A.110, the court looked at RCW 36.70A.030(23)[17] that defines "rural character" based on patterns of land use and development established by the County "in the rural element of its comprehensive plan" and the court examined RCW 36.70A.070(5), which governs the designation of rural lands in the rural element of the comprehensive plan.

As discussed above, RCW 36.70A.070(5) requires the "rural element" of Clark County's comprehensive plan to include rural "lands that are not designated for urban growth, agriculture, forest, or mineral resources [emphasis added]." Therefore, as discussed in more detail above, lands designated for "agriculture, forest or mineral resources" are by definition not "rural lands" or "rural areas" within the meaning of GMA.

The GMA puts resource lands into a separate category from rural lands. There is no provision of the GMA placing any limits on sewer needed to serve resource uses on resource lands. RCW 36.70A.110 is limited to rural areas and has no applicability to sewer serving resource lands, which by definition are not "rural," since resource lands are in a category that is separate from urban and rural.

Further, RCW 36.70A.110 poses no limitation on sewer running through rural lands to serve resource lands located beyond. The express limitation in RCW 36.70A.110 is on sewer being "extended to or expanded in rural areas." In *Cooper Point*, the court interpreted RCW 36.70A.110 to prohibit sewer from serving rural areas, unless the requirements for the exception were met. This would not prevent sewer from running through rural lands to serve urban areas or resource lands located beyond the rural areas, provided the sewer is tightlined[18] to prevent any rural lands from connecting to the sewer.

In fact, King County permits sewer to cross rural lands if the sewer is "tightlined" to prevent the sewer from serving the rural lands. King County Code Section 13.24.132 states:

> "**New sewer facilities in rural areas**. New sewer facilities shall be allowed to cross the rural areas only if the facilities are:
>
> * * * * *
>
> B. Tightlined or otherwise subject to access restrictions precluding service to adjacent rural areas."

Clark County could do the same in its implementation of SB 5517 to ensure any sewers installed to serve FRDUs on resource land prohibit connection to rural lands in compliance with RCW

[17] At the time the *Coopers Point* case was decided, the definition of "rural character" was in RCW 36.70A.030(14). It has since been renumbered to RCW 36.70A.030(23), but the relevant provisions the court examined are unchanged.

[18] Tightlining of sewer means that a sewer is designed and sized to only serve a particular use or structure.

36.70A.110(4). The Freight Rail Dependent Uses Advisory Committee (FRDUAC) included this in their recommendations.

Based on this in-depth analysis of the text and context of SB 5517, there is no ambiguity in RCW 36.70A.108(2) that merits examination of legislative history or resort to canons of construction.

The only interpretation that makes sense is that sewer is allowed to serve rail dependent industry on resource lands as specifically authorized by RCW 36.70A.060(1)(a). Whatever limitation RCW 36.70A.108(2) may or may not provide, there is no plausible interpretation of RCW 36.70A.108(2) that limits the development of sewer outside of urban areas to serve rail dependent industry located on resource lands adjacent to the short line railroad, provided that any sewer crossing rural lands is tightlined, as recommended by the FRDUAC.

Therefore, there is no need to examine the legislative history or to resort to the canons of construction. Nevertheless, for completeness, we will analyze both the legislative history of SB 5517 and apply the canons of construction in the remaining sections of this legal analysis.

B. Analysis of Legislative History of SB 5517.

We begin our analysis of the legislative history by examining the proposed RCW 36.70A.108(2) language of Original SB 5517:

> (2) The transportation element required by RCW 36.70A.070 may include development of freight rail dependent uses on land adjacent to a short line railroad. Development regulations may be modified to include development of freight rail dependent uses that do not require urban governmental services in rural lands.

SB 5517 was amended three times during the legislative process, but the language allowing development regulations to be modified "to include development of freight rail dependent uses that do not require urban governmental services in rural lands" was there from the beginning. This means that the second sentence of RCW 36.70A.108(2) was not added during the legislative process for the purpose of limiting sewer to serve FRDUs to urban areas.

SB 5517 was amended to narrow its scope, but the narrowing was primarily geographical. Original SB 5517 applied statewide. SB 5517 was narrowed in E2 to limit FRDUs to Clark County only, and then expanded in E3 to also include Okanogan County.

The only other change was E1 modified RCW 36.70A.070(5)(b) to allow counties to make FRDUs a rural use rather than requiring counties to do so, and E2 removed FRDUs from the rural element of the comprehensive plan in RCW 36.70A.070(5)(b), as well as removing references to FRDUs from the definition of Rural Character in RCW 36.70A.030(16)(b) and the definition of Rural Development in RCW 36.70A.030(17).

These changes in E2 and E3 indicate an intent to allow FRDUs on agricultural, forest and mineral resource land per RCW 36.70A.060(1)(a) but not to allow them on rural lands, except as

provided in RCW 36.70A.108(2). Original SB 5517 would have allowed FRDUs on rural lands through amendments to the definitions of "rural development" and "rural character" in RCW 36.70A.030 and the provisions relating to the rural element of the comprehensive plan in RCW 36.70A.070, but these provisions were deleted through E1 and E2. We must presume this deletion was intentional and the legislature did not intend for rural lands to be developed for rail dependent industry, except as provided in RCW 36.70A.108(2). The final version of SB 5517 (E3) allowed FRDUs on resource lands per RCW 36.70A.060(1)(a) and on rural lands per RCW 36.70A.108(2).

Against the backdrop of this legislative history, the second sentence of RCW 36.70A.108(2) becomes clear. It allows Clark County the additional option of modifying development regulations to allow certain types of rail dependent industry on rural lands.

RCW 36.70A.060(1)(a) provides an opportunity for FRDUs on resource lands, but not rural lands. The second sentence of RCW 36.70A.108(2) states "Such counties and cities may also modify development regulations to include development of freight rail dependent uses that do not require urban governmental services in rural lands." This sentence creates an additional opportunity for Clark County to allow rail dependent industry on rural lands.

Based on the analysis in Section IV.A.1, the language "urban governmental services" in RCW 36.70A.108(2) is limited to multimodal public transit. However, even if RCW 36.70A.108(2) can be interpreted to apply to other types of urban services besides the multimodal public transit, the legislative history and the express language expressly limit RCW 36.70A.108(2) to "rural lands."

RCW 36.70.108(2) says nothing about sewer serving FRDUs on resource lands. Sewer, *is a type of* urban governmental service, regardless of the size of the sewer line or the uses it supports. *Cooper Point Ass'n v. Thurston County*, 108 Wn. App. 429, 31 P.3d 28 (2001), *aff'd*, 148 Wn.2d 1, 57 P.3d 1156 (2002) (interpreting the definitions of urban governmental services and rural governmental services in RCW 36.70A.030)[19].

Since sewer is a type of "urban governmental services," sewer cannot and does not "require urban governmental services." Therefore, RCW 36.70A.108(2) cannot apply to sewer serving FRDUs on resource lands.

Arguably, even on rural lands, the urban governmental serves referred to in RCW 36.70A.108(2) are limited to those relating to transportation (*i.e.*, public transit). But, even if the reference to "urban governmental services" RCW 36.70A.108(2) is construed broadly to include sewer, there is no argument that RCW 36.70A.108(2) limits sewer on resource lands.

Both the Senate Committee Bill Report and the House Committee Bill Analysis support this interpretation. Nothing in either of those indicates any intent to limit sewer serving FRDUs on

[19] As mentioned above in Section IV.A.2, in *Cooper Point*, the Washington Supreme Court also looked at the meaning of "rural areas" as that term is used in RCW 36.70A.110(4) and held that "rural areas" were defined "in accord with the GMA's rural designation provision, RCW 36.70A.070(5)." *Cooper Point*, 148 Wn.2d at 10-11.

resource lands. The Senate Committee Bill Report summarizes the opposition testimony of Fururewise. In its testimony, Futurewise said nothing about prohibiting sewer outside urban growth areas to serve FRDUs on resource lands. Futurewise expressed a concern about the loss of agricultural lands, which is a concern the legislature rejected in its adoption of SB 5517 with its amendments to RCW 36.70A.060(1)(a) expressly allowing FRDUs on agricultural land.

Futurewise didn't testify that urban services shouldn't be extended to resource lands to serve FRDUs; rather, Futurewise expressed concern about "creating jobs without urban services" and "what that would actually look like." However, this concern is misplaced since SB 5517 allows FRDUs on agricultural land and FRDUs include the "infrastructure" needed to serve FRDUs, so FRDUs won't create jobs without urban services.

As summarized in the Senate Committee Bill Report, numerous people testified in favor of SB 5517[20] and their testimony ultimately carried the day with the legislature. The testimony in favor of SB 5517 emphasized the 6,500 jobs SB 5517 would create mostly on agricultural resource land in Clark County and the difficulty of de-designating agricultural land that would be "fixed" by SB 5517.

The House Bill Committee Report discussed the provisions of SB 5517 relating to natural resource lands stating:

> Natural Resource Lands.
>
> Counties and cities are authorized to adopt development regulations to assure that agriculture, forest, and mineral resource lands adjacent to short line railroads may be developed for freight rail dependent uses.

The House Committee Bill Report also noted that the new definition of FRDUs defined FRDUs to include both buildings and "infrastructure" and that FRDU facilities were "both urban and rural development for purpose of the GMA." The House Bill Committee report discussed SB 5517 provisions relating to the rural element[21] of the comprehensive plan separately from "Natural Resource Lands" and there is nothing to indicate that the provisions of SB 5517 related to rural lands were intended to limit FRDUs on resource lands.

In conclusion, the legislative history of SB 5517 supports the conclusion that sewer is allowed to serve rail dependent industry on resource lands as specifically authorized by RCW 36.70A.060(1)(a). Since the provisions of Original SB 5517 allowing FRDUs on rural lands

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[20] According to the Senate Committee Bill Report, only Bryce Yadon of Futurewise testified against SB 5517, and the following testified in favor: Senator Lynda Wilson, Prime Sponsor; Amber Carter, Client: Portland Vancouver Junction Railroad; Mark Boldt, Clark County Councilors; Mike Bomar, Columbia River Economic Development Council; Mike Ennis, Association of Washington Business.

[21] Most of the provisions relating to the rural element of the comprehensive plan were later deleted from SB 5517 in E2, but the provisions relating to development regulations for FRDUs on rural lands in RCW 36.70A.108(2) were in Original SB 5517 and were adopted essentially unchanged. The only change to that section was language limiting application of RCW 36.70A.108(2) to Clark County.

were deleted in E1 and E2, this supports an interpretation that the legislature intended to limit FRDUs on rural lands to those circumstances described in RCW 36.70A.108(2).

Based on the changes made in E1 and E2, the legislative history sheds light on the second sentence of RCW 36.70A.108, which allows Clark County to "also modify development regulations" on "rural lands" for FRDUs "that do not require urban governmental services." This is the only provision of SB 5517 authorizing any modification of development regulations for FRDUs on "rural lands." Rather than operating through "negative implication" as a limit on resource lands, RCW 36.70A.108(2) provides an additional opportunity to allow FRDUs on "rural lands" that meet the other provisions of RCW 36.70A.108(2).

This additional opportunity to allow FRDUs on rural lands under the provisions of RCW 36.70A.108(2) does not limit the broad authority to allow FRDUs (which are defined to include sewer used for rail dependent industry) on resource lands.

C. Analysis of the applicable Canons of Construction.

Since rural lands are a separate category from resource lands and RCW 36.70A.108(2) only applies to FRDUs on rural lands, there is no ambiguity and therefore no need to resort to the canons of construction. However, for completeness, we will analyze RCW 36.70A.108(2) under the canons of construction.

The second sentence of RCW 36.70A.108(2) states:

> "Such counties and cities <u>may also</u> modify development regulations to include development of freight rail dependent uses that do not require urban governmental services in <u>rural lands</u> [emphasis added]."

As discussed in Section III.B.7, above, it is a well-known canon of construction that the word "may" is permissive and does not create any duty or obligation. Per the canon discussed in Section III.B.6, above, it is also a well-known canon that undefined terms are given their common dictionary definition. The word "also" is defined in Merriam Webster's Dictionary[22] as "in addition : BESIDES, TOO." Thus, everything that comes after "may also" is something that is optional and "in addition to" other options Clark County has for FRDUs.

The only argument that RCW 36.70A.108(2) precludes sewer for FRDUs on resource lands relies on the so-called "negative implication" that by allowing additional options for modifying development regulations for rural lands, the legislature somehow intended to create additional restrictions on FRDUs on resource lands.

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[22] https://www.merriam-webster.com/dictionary/also#:~:text=%3A%20in%20addition%20%3A%20besides%2C%20too,and%20also%20a%20fine%20actress.

That argument is quite simply nonsense.

The so-called "negative implication" argument would rewrite RCW 36.70A.108(2) to read:

> "Such counties and cities may **only** ~~**also**~~ modify development regulations to include development of freight rail dependent uses that do not require urban governmental services **outside urban growth areas** ~~**in rural lands**~~ [emphasis added]."

Courts are not in the business of re-writing statutes. *Applied Industries*, 74 Wash. App. at 79. That is the job of the legislature. If the legislature had intended for RCW 36.70A.108(2) to preclude sewer outside of urban growth areas, the legislature could have written the statute to say just that. But courts apply the language as written; they do not rewrite statutes. Applying the canon discussed in Section III.B.2, above, courts give meaning to every word in a statute and do not add or subtract words and above all, courts "may not rewrite them to suit their views of what they think the statutes ought to say." *Applied Industries*, 74 Wash. App. at 79.

As written, there is no "negative implication" to be drawn because RCW 36.70A.180(2) and RCW 36.70A.060(1)(a) govern different things. RCW 36.70A.180(2) governs the transportation element and allows certain types of FRDUs on rural lands. RCW 36.70A.060(1)(a) specifically authorizes all types of FRDUs (defined in RCW 36.70A.030(13) to include sewer) on resource lands.

As the court explained in *Sifferman*:

> Under the interpretive canon of *expressio unius est exclusio alterius*, there arises a negative implication that "'when a statute designates certain persons, things, or manners of operation, all omissions should be understood as exclusions.'"

Sifferman, 19 Wash. App. 2d at 657. The *expressio unius* canon cannot apply here because RCW 36.70A.108(2) "designates certain things" (allowing some FRDUs on <u>rural lands</u>), whereas RCW 36.70A.060(1)(a) designates different things (allowing all FRDUs on <u>resource lands</u>). Since rural lands and resource lands are different types of things, *expressio unius* does not apply.

Further, and perhaps most importantly, RCW 36.70A.060(1)(a) is not an "omission." There can only be a negative implication if there is an "omission." *Sifferman*, 19 Wash. App. 2d at 657. So, for instance, if RCW 36.70A.060(1)(a) didn't exist, one might argue a negative implication prohibiting FRDUs on resource lands based on the language of RCW 36.70A.108(2).

By allowing certain FRDUs on rural lands, one might draw a negative implication that all other FRDUs were prohibited if there were no other provisions allowing FRDUs on other types of lands. But SB 5517 has no such omission. RCW 36.70A.060(1)(a) specifically authorizes FRDUs on resource lands.

A negative implication cannot override the express grant of authority for Clark County to amend its development regulations "to assure" FRDUs (defined in RCW 36.70A.030(13) to include sewer) can be developed on resource lands adjacent to the railroad.

Only "omissions" can be considered to be exclusions under a negative implication. *Sifferman*, 19 Wash. App. 2d at 657.

Further, if RCW 36.70A.108(2) were read to prohibit sewer for FRDUs on resource lands, it would completely gut SB 5517, since any rail dependent fabrication or processing use would require sewer. Under the canon discussed in Section III.B.3, "strained consequences" should be avoided. *Mason*, 166 Wash. App. at 863-64.

Finally, under the canon discussed in Section III.B.1 courts strive to harmonize statutes to resolve conflicts and give effect to every provision as a unified whole. *In re Estate of Kerr*, 134 Wash. 2d at 335-36.

RCW 36.70A.060(1)(a) specifically authorizes FRDUs (defined in RCW 36.70A.030(13) to include sewer) on resource lands. Since SB 5517 was amended in E1 and E2 to remove provisions that would have allowed FRDUs on rural lands, there is no provision authorizing FRDUs on rural lands other than RCW 36.70A.108(2). These provisions can be harmonized by reading them together:

- RCW 36.70A.060(1)(a) authorizes FRDUs on resource lands without limitation.
- RCW 36.70A.108(2) authorizes FRDUs on rural lands subject to the provisions of RCW 36.70A.108(2).

Since RCW 36.70A.060(1)(a) applies to resource lands and RCW 36.70A.108(2) applies to rural lands, they operate independently but in harmony. There is no tension between them to be resolved.

V. Conclusion.

Regardless of whether SB 5517 is analyzed under the text and context of the statute, the legislative history or the canons of construction, the conclusion is the same.

The definition of FRDUs in RCW 36.70A.030(13) includes both rail dependent industrial uses and the infrastructure (including sewer) needed to serve those uses. FRDUs are both urban and rural.

RCW 36.70A.060(1)(a) authorizes FRDUs (defined in RCW 36.70A.030(13) to include sewer) on resource lands without limitation.

Resource lands are not a subset of "rural lands." Resource lands and rural lands are completely separate categories under the GMA. See RCW 36.70A.030(23) and (24); RCW 36.70A.070(5);

WAC 365-196-210(27); and Clark County Comprehensive Plan 2015-2035, Rural and Natural Resource Element-81.

Therefore, the language in the second sentence of RCW 36.70A.108(2) that "Such counties and cities may also modify development regulations to include development of freight rail dependent uses that do not require urban governmental services in rural lands" cannot prohibit sewer on resource lands because RCW 36.70A.108(2) only pertains to "rural lands."

Based on all of the above, RCW 36.70A.108(2) does not prohibit sewer outside of the urban growth boundary that serves FRDUs located on resource lands. Such sewer is expressly allowed by RCW 36.70A.060(1)(a) and the definition of FRDUs in RCW 36.70A.030(13), provide such sewer serves only FRDUs located on resource lands and is tightlined as recommended by the Freight Rail Dependent Uses Advisory Committee.

Sincerely,

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