

No. 67301-7-I

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COURT OF APPEALS, DIVISION 1  
OF THE STATE OF WASHINGTON

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MARY SEBEK and NANCY FARNAM,  
Plaintiffs-Appellants,

v.

CITY OF SEATTLE and DOES 1 through 10,  
Defendants-Appellees.

and

WOODLAND PARK ZOOLOGICAL SOCIETY,  
Defendant-Intervenor.

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PRINCIPAL CORRECTED BRIEF OF PLAINTIFFS-APPELLANTS

MARY SEBEK AND NANCY FARNAM

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## RELEVANT STATUTORY PROVISIONS

### RCW 16.52.207

- (1) A person is guilty of animal cruelty in the second degree if, under circumstances not amounting to first degree animal cruelty, the person knowingly, recklessly, or with criminal negligence inflicts unnecessary suffering or pain upon an animal.
- (2) An owner of an animal is guilty of animal cruelty in the second degree if, under circumstances not amounting to first degree animal cruelty, the owner knowingly, recklessly, or with criminal negligence:
  - (a) Fails to provide the animal with necessary shelter, rest, sanitation, space, or medical attention and the animal suffers unnecessary or unjustifiable physical pain as a result of the failure[.]

### Seattle Municipal Code § 9.25.081

It is unlawful for any person to:

- A. Injure, kill, or physically mistreat any animal under circumstances not amounting to first degree animal cruelty as defined in RCW 16.52.205 . . . ;  
.....
- F. Tether or confine any animal in such a manner or in such a place as to cause injury or pain not amounting to first degree animal cruelty defined in RCW 16.52.205, or to endanger an animal; or to keep an animal in quarters that are injurious to the animal due to inadequate protection from heat or cold, or that are of insufficient size to permit the animal to move about freely;
- G. Keep an animal in an unsanitary condition or fail to provide sufficient food, water, shelter, or ventilation necessary for the good health of that animal;
- H. Fail to provide his/her animal the medical care that is necessary for its health or to alleviate its pain[.]

## DEFINED TERMS

For the convenience of the Court, Plaintiff-Appellants provide the following definitions of terms used in this brief:

Plaintiffs	Plaintiff-Appellants Mary Sebek and Nancy Farnam
City	Defendant-Appellee City of Seattle
WPZS	Intervenor Woodland Park Zoological Society
Zoo	Woodland Park Zoo
Management Agreement	The Woodland Park Zoo Operations and Management Agreement between the City, acting through its Department of Parks and Recreation, and the WPZS, dated December 17, 2001 and in effect March 2002.
Elephants	Elephants housed or formerly housed at the Zoo: Bamboo, Chai, Hansa (deceased), Sri (on loan), Watoto.
Elephant Exhibit	The portion of the Zoo allocated to the captivity of the Elephants, including the barn and grounds.
12(c) Motion	Defendant City of Seattle's April 25, 2011 Motion for Judgment on the Pleadings.
Animal Cruelty Laws	RCW 16.52.207 and Seattle Municipal Code § 9.25.081.

## INTRODUCTION

Plaintiff-Appellants Mary Sebek and Nancy Farnam ask this Court to reinstate their taxpayer action against the City of Seattle, which was erroneously dismissed by the Superior Court for lack of standing. The Plaintiffs allege that City houses elephants at the Woodland Park Zoo in gross violation of state and local animal cruelty laws, and at substantial taxpayer expense. The lower court held that the Plaintiffs did not have standing because the City *itself* had not acted illegally, presumably accepting the City's argument that any illegal conduct was that of the Woodland Park Zoological Society, which manages the Zoo on the City's behalf. This result is incompatible with controlling Supreme Court precedent and, if affirmed, would undermine Washington's well-settled doctrine of taxpayer standing. Furthermore, it is inconsistent with the allegations of the Complaint, which establish illegal conduct by the City independent of any actions by its contractor.

Washington Supreme Court precedent forecloses the narrowing of taxpayer standing to exclude challenges to conduct undertaken by third parties acting on the government's behalf. In *State ex rel. Boyles v. Whatcom County Superior Court*, 103 Wn. 2d 610, 649 P.2d 27 (1985), the court held that taxpayers had standing to challenge a work-release program incorporating mandatory religious services, notwithstanding the fact that the program was run entirely by a third party, and there were no

allegations that the defendant-county had any control over its content. *Id.* at 612-15.

If a government agency could avoid taxpayer challenge, and judicial review, by relying on third parties to engage in illegal activity on its behalf, the taxpayer standing doctrine would be substantially undermined. Indeed, were the ruling below to stand, the facts of this case would become a blueprint for government agencies seeking to expand their operations beyond the bounds permitted by law. Until 2002, the City operated the Zoo directly, and the zookeepers and staff were City employees. In that year, the City transferred its Zoo employees to the WPZS and entered into a long-term contract with the WPZS to manage the Zoo as before. Neither the City nor the Superior Court suggests the Plaintiffs would have lacked standing before 2002—instead they rely solely on the City’s form over substance reclassification of Zoo staff from employees to contractors. If the Superior Court’s ruling is allowed to stand, zoos are not the only government operations that could be outsourced and insulated from taxpayer challenge.

Furthermore, the Superior Court’s ruling runs afoul of the central animating principal of taxpayer standing: that taxpayers have the right to challenge the illegal use of taxpayer funds, because that money is “collected from the taxpayers to be properly and lawfully expended for their benefit, and if illegally or improperly expended the taxpayer loses the benefit which he would otherwise have received from his contribution.”

*State ex rel. Chealander v. Morgan*, 131 Wash. 145, 148, 229 P. 309 (1924). In its brief oral opinion, the Superior Court justified its holding that the Plaintiffs had not pled any illegal activity with the observation that, “the illegal acts of the City are basically funding.” But it is precisely funding—taxpayer funds “illegally or improperly expended”—that is at the heart of taxpayer standing. The doctrine gives taxpaying plaintiffs the right to stop the illegal use of their money.

Finally, Plaintiffs’ action should be reinstated even without consideration of these errors, because the Superior Court made an even more fundamental error on the pleadings before it. The Complaint alleges that the Zoo’s Elephant Exhibit, which the City designed, built, and owns, is physically insufficient, and that the housing of the Elephants in that facility violates the law independently of any illegality in day-to-day operations. The Complaint alleges that the ground surfaces of the Elephant Exhibit are too hard for sustained standing, leading to deep cracks and infections in the Elephants’ feet. This problem is made worse by the insufficient size of the barn and grounds, which limit the Elephants’ mobility, especially on cold Seattle nights when they must be restricted to the barn and its cement floor. The limited space and lack of meaningful activity and interaction with other elephants further exacerbates these issues because it leads to “stereotypic” behavior—prolonged, repetitive swaying and pacing that puts unnatural stress on the Elephants’ already injured feet.

As alleged in the Complaint, all of this is a direct result of keeping the Elephants in the Elephant Exhibit, which the City designed, built and owns. And it constitutes unnecessary suffering and pain, the threshold for violation of the law against cruelty to animals. Plaintiffs have standing to challenge the City's housing of its Elephants in its inadequate Elephant Exhibit, regardless of who the City pays to keep them there, and regardless of how kindly or cruelly the keeper carries out that duty.

## ASSIGNMENTS OF ERROR

The Superior Court's dismissal on standing grounds was an error of law. The court incorrectly found that the City was not acting illegally, despite the fact that it owns, funds, and oversees the Zoo where the Elephants are confined in violation of the Animal Cruelty Laws. The animal cruelty law violations were not in dispute on the pleadings; rather, the court's ruling implicitly rested on the fact that the City does not directly manage the Zoo, but rather contracts with the WPZS to do so. The court's ruling suffers from two independent errors:

*First*, the City's ongoing operation of the Elephant Exhibit is subject to taxpayer challenge, regardless of whether it uses City employees or a third-party contractor to conduct those operations. The Washington Supreme Court has held that taxpayer standing lies to challenge government illegality where the actual illegal conduct is performed by a third party acting on the government's behalf. Furthermore, it would gravely undermine the taxpayer standing doctrine if government agencies could evade judicial review merely by reclassifying employees engaged in illegal conduct as nominal third-party contractors.

*Second*, the City's housing of Elephants in the Elephant Exhibit is itself illegal, regardless of who manages the Zoo's daily operations. The Complaint clearly alleges that the facility itself is a substantial cause of the Elephants' unnecessary suffering and pain, in violation of the Animal Cruelty Laws.

## STATEMENT OF THE CASE

The City of Seattle owns and substantially funds the Woodland Park Zoo. Three elephants are currently confined at the Zoo, a fourth is on loan to the St. Louis Zoo, and a fifth died at the Zoo in 2007 at the age of six. Zoo records show that the surviving elephants suffer from various health problems, including osteoarthritis, intestinal disorders, abnormal skin growth, infections, and skin abscesses. They also engage in varying degrees of “stereotypic” behavior—repetitive swaying or pacing—which Plaintiffs allege is a sign of severe psychological distress.

Until 2002, the City provided for day-to-day management of the Zoo through employees of the Parks and Recreation Department. In 2002, the City contracted with the Woodland Park Zoological Society to take over day-to-day management of the Zoo. CP 159<sup>1</sup> The WPZS is a non-profit organization that had previously provided fund-raising, marketing, and other services to the Zoo. CP 107. The City shifted Zoo workers from the City’s payroll to the WPZS and entered into a Management Agreement with the WPZS. CP 177. Under the Management Agreement, the City is obligated to provide over \$5,000,000 per year for Zoo operations, CP 169, and the Zoo enjoys an exemption from City admissions taxes. CP 175. The WPZS is required to submit regular reports to the City as well as an Annual Plan, CP 180-183, and City

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<sup>1</sup> The City’s 12(c) Motion asks that the Court take judicial notice of the Management Agreement on the grounds that its contents are alleged in the Complaint. CP 98 n.5.

officials sit *ex officio* on the WPZS Board of Directors. CP 182. The City retains ownership of the land and the Zoo facilities, including the Elephant Exhibit. CP 168-169. The City also retains ultimate title to the Elephants themselves. CP 176.

Plaintiffs Mary Sebek and Nancy Farnam filed the Complaint in this case in King County Superior Court on June 29, 2010, naming the City of Seattle as Defendant. CP 1-16. On September 10, 2010, the WPZS filed a motion to intervene, CP 23-78, which Plaintiffs did not oppose, CP 79-81, and which was granted on September 22, 2010. CP 82-83. On April 25, 2011, the City filed a Rule 12(c) Motion for Judgment on the Pleadings, which is the subject of this appeal. CP 97-207. Also on April 25, 2011, the City and WPZS jointly filed a CR 56 Motion for Summary Judgment. On May 27, 2011, the Superior Court heard argument on both motions, and immediately thereafter entered an order granting the City's 12(c) Motion. Ex. A. The Superior Court did not rule on the City and WPZS's joint CR 56 Motion for Summary Judgment.

The Superior Court's only explanation for its ruling was provided in an oral opinion, read from the bench immediately following counsels' presentations. The court ruled as follows:

The plaintiff claims that the illegal acts of the City are basically funding. The Court finds that the plaintiffs have not pled facts which, if true, would prove that the City is acting illegally. The plaintiff lacks standing because the City has not performed any illegal acts. . . . The City's motion to dismiss judgment on the pleadings under Civil Rule 12(c) is granted. RP 17:8-17.

The Plaintiffs timely filed their Notice of Appeal on June 14, 2011.

## STANDARD OF REVIEW

A trial court's order on a CR 12(c) motion for judgment on the pleadings is subject to de novo review. *N. Coast Enters., Inc. v. Factoria P'ship*, 94 Wash. App. 855, 858, 974 P.2d 1257 (1999).

"Dismissal under CR 12 is appropriate only if it is beyond doubt that the plaintiff can prove no facts that would justify recovery. In making this determination, the court must presume that the plaintiff's allegations are true and may consider hypothetical facts that are not included in the record. A CR 12 motion should be granted sparingly so that a plaintiff is not improperly denied adjudication on the merits." *Gaspar v. Peshastin Hi-Up Growers*, 131 Wash. App. 630, 635, 128 P.3d 627 (2006) (citations removed).<sup>2</sup>

## ARGUMENT

### **I. Taxpayer Standing Is Well-Established In Washington Law, And Lies To Prevent Illegal Government Conduct.**

It is axiomatic that a government cannot operate in violation of the law. "Nothing can destroy a government more quickly than its failure to observe its own laws[.]" *Mapp v. Ohio*, 367 U.S. 643, 659, 81 S. Ct. 1684, 6 L. Ed. 2d 1081 (1961). As a bulwark against unlawful

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<sup>2</sup> The Washington Supreme Court has expressly declined to adopt the reading of Fed. R. Civ. P. 12(b) announced by the United States Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007). *McCurry v. Chevy Chase Bank, FSB*, 169 Wash. 2d 96, 101, 233 P.3d 861 (2010).

government conduct, Washington has long afforded its taxpayers, “a judicial forum [to] contest the legality of official acts of their government.” *State ex rel. Boyles v. Whatcom Cnty. Superior Court*, 103 Wash. 2d 610, 614, 649 P.2d 27 (1985). Where illegal government actions are challenged, “taxpayers . . . need allege no direct, special or pecuniary interest in the outcome of their action[.]” *City of Tacoma v. O’Brien*, 85 Wash. 2d 266, 269, 534 P.2d 114 (1975). This is the doctrine of taxpayer standing, well-settled in the State of Washington.<sup>3</sup>

Taxpayer standing is not limited to any particular species of government conduct. To the contrary, Washington courts have allowed taxpayer challenges to a wide range of government functions. *See, e.g., Boyles*, 103 Wash. 2d 610 (challenge to a privately run work-release program incorporating mandatory religious services); *O’Brien*, 85 Wash. 2d at 269 (challenge to distribution of funds to contractors in response to rapidly rising oil prices); *Calvary Bible Presbyterian Church of Seattle, v. Bd. of Regents of the Univ. of Wash.*, 72 Wash. 2d 912 (1967) (challenge to the teaching of a class on the Bible as literature at the University of

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<sup>3</sup> Washington is not unusual in this regard—taxpayer standing has been widely adopted by state courts and legislatures. *See, e.g.,* Cal. Civ. Proc. Code § 526a; N.Y. State Fin. Law § 7-A; Ohio Rev. Code Ann. § 309.13 (2011); *Zeigler v. Baker*, 344 So. 2d 761, 763-64 (Ala. 1977); *Wilmington v. Lord*, 378 A.2d 635, 637-38 (Del. 1977); *Fergus v. Russel*, 270 Ill. 304, 314, 110 N.E. 130 (1915); *La. Associated Gen. Contractors, Inc. v. Calcasieu Parish Sch. Bd.*, 586 So. 2d 1354, 1357-58 (La. 1991); *E. Mo. Laborers Dist. Council v. St. Louis Cnty.*, 781 S.W.2d 43, 47 (Mo. 1989); *Green v. Shaw*, 319 A.2d 284, 291-92 (N.H. 1974); *Kozesnik v.*

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Washington); *Chealander*, 131 Wash. at 148 (challenge to construction of new highway); *Kightlinger v. Pub. Util. Dist. No. 1 of Clark Cnty.*, 119 Wash. App. 501, 81 P.3d 876 (2003) (challenge to government-run appliance repair business); *Robinson v. City of Seattle*, 102 Wash. App. 795, 804-05, 10 P.3d 452 (2000) (challenge to mandatory urinalysis testing of prospective government employees).

Government expenditures are particularly within the scope of taxpayer challenge. Indeed, they are at its heart—it is the plaintiffs’ status as taxpayers that gives them the right to challenge government activity in the first place, and nothing could be more germane to that right than contesting the improper use of those taxes. Even under *federal* law, which is exceedingly unfriendly towards taxpayer standing actions, municipal taxpayers may challenge “an allegedly improper expenditure of municipal funds” based on nothing more than their status as a taxpayer. *Cammack v. Waihee*, 932 F.2d 765, 770 (9th Cir. 1991). In Washington, taxpayers may “maintain an action to enjoin the improper use” of taxpayer funds, because such funds are “collected from the taxpayers to be properly and lawfully expended for their benefit, and if illegally or improperly expended the taxpayer loses the benefit which he would otherwise have received from his contribution.” *State ex rel. Chealander v. Morgan*, 131 Wash. 145, 148, 229 P. 309 (1924).

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*Montgomery*, 131 A.2d 1, 13-14 (N.J. 1957); *Williams v. Huff*, 52 S.W.3d 171, 179 (Tex. 2001).

Finally, it is no defense to a taxpayer challenge for a government agency to assert that it has acted within its discretion. Where unlawful activity, funding, or policies have been identified by the plaintiff, there is no discretion because, “[a] government official has no discretion to violate the binding laws, regulations, or policies that define the extent of his official powers.” *Red Lake Band of Chippewa Indians v. United States*, 800 F.2d 1187, 1196 (D.C. Cir. 1986). *See also State ex rel. Yeargin v. Maschke*, 90 Wash. 249, 253, 155 P. 1064 (1916) (“If the action of the board of county commissioners is arbitrary or capricious, or if its action is prompted by wrong motives, there is not only an abuse of discretion, but in contemplation of law there has been no exercise of the discretionary power.”); *Culp v. City of L.A.*, No. B208520, 2009 WL 3021762, at \*9 (Cal. Ct. App. Sept. 23, 2009) (applying California law) (“[A] court may determine whether a governmental body is engaging in, or is poised to engage in, illegal expenditures, without trespassing upon legislative or executive discretion. Governmental bodies do not have the discretion to act illegally.”).

There are three elements required to establish taxpayer standing in Washington. First, the plaintiff must be a taxpayer. Second, the plaintiff must have previously requested action by the Attorney General. Third, the challenged government action must be illegal, not merely unwise or disfavored. *See Robinson*, 102 Wash. App. at 804-05. There is no dispute in this case that the Plaintiffs have satisfied the first and second elements

of taxpayer standing—this appeal concerns the third element: the City’s illegal conduct.

**II. The Complaint Alleges Facts Establishing That The Confinement of The Elephants At The Zoo Violates State and Local Animal Cruelty Laws.**

As an initial matter, there can be no dispute that the allegations of the Complaint establish that the law is being broken at the Woodland Park Zoo. RCW 16.52.207(1) provides that any person, “is guilty of animal cruelty in the second degree if . . . the person knowingly, recklessly, or with criminal negligence inflicts unnecessary suffering or pain upon an animal.” Subsection 2 of the statute further provides that “[a]n owner of an animal” is guilty of the same offense if the owner “[f]ails to provide the animal with necessary shelter, rest, sanitation, space, or medical attention and the animal suffers unnecessary or unjustifiable physical pain as a result of the failure[.]”

The legislature has also provided for certain exceptions to these provisions. RCW 16.52.180 gives primacy to the state’s “game laws” over the animal cruelty statutes, and excludes various accepted practices, such as killing certain animals for food, from their scope. It also exempts “properly conducted scientific experiments or investigations” undertaken by properly licensed research facilities. RCW 16.52.185 further excludes “accepted animal husbandry practices” and the use of animals in rodeo events and fairs. There are no exceptions for zoos.

Furthermore, Seattle Municipal Code § 9.25.081 makes it a crime to “physically mistreat any animal . . . confine any animal in such a

manner or in such a place as to cause injury or pain [or] keep an animal in quarters . . . that are of insufficient size to permit the animal to move about freely.”

These laws are constitutionally sound. Washington courts have repeatedly rejected vagueness challenges to the felony anti-cruelty statute (RCW 16.52.201), finding that its prohibition of “undue suffering” is not impermissibly vague. *State v. Paulson*, 131 Wash. App. 579, 587, 128 P.3d 133, 136 (2006). The exception provisions have also been upheld. *Nw. Animal Rights Network v. State*, 158 Wash. App. 237, 245-46, 242 P.3d 891 (2010) (“Our legislature has determined that certain common and customary activities involving animals are not abhorrent to our society. . . . The courts are not in a position to agree or disagree with our legislature’s . . . determination as to which animals will be protected and in what manner this protection will be afforded.”).

The allegations in the Complaint, which are drawn primarily from the Zoo’s own records, more than establish that this prohibited conduct is ongoing at the Zoo and inherent to the confinement of elephants there:

- “As a result of their confinement and the inadequate facilities at the Zoo, the Zoo’s elephants suffer from foot and joint problems [including] chronic osteoarthritis, abscesses, and infections that cause significant pain and require medication and surgical intervention.” CP 8.

- “The hard-packed sand and dirt in the outdoor portion of the Zoo’s elephant exhibit is harmful to the sensitive feet of the Zoo’s elephants.” CP 7.
- “The surface of the barn in the Zoo’s elephant exhibit is inherently harmful to the sensitive feet of the Zoo’s elephants.” CP 7.
- “Bamboo and Watoto both suffer from osteoarthritis, a degenerative and painful joint disease. Osteoarthritis is caused by standing on hard surfaces, lack of movement, and excess weight. Bamboo and Chai suffer from foot abscesses, which are pockets of fluid and pus that often develop above the nails of the foot or underneath the foot and are very painful. Abscesses are caused by standing on hard surfaces, lack of movement, excessive moisture (such as that caused by standing in excrement), and excess weight.” CP 8.
- “The Zoo has attempted to artificially inseminate Chai at least fifty-seven times. It has never worked. She has suffered multiple miscarriages. These miscarriages have caused Chai to suffer both physical and psychological pain.” CP 9.
- “In June 2002, when Hansa was less than two years old, she was beaten with a bullhook for eating dirt, causing her

to run away screaming in front of Zoo visitors. A bullhook is a stick with a sharp steel hook on one end that is used to puncture and prod sensitive areas on the elephant's body in order to coerce elephant behavior through fear and submission." CP 10.

- "The Zoo's practices, described throughout this Complaint, combined with the Zoo's limited space, have caused the elephants severe psychological trauma." CP 11.
- "The elephants suffer from painful intestinal disorders, sometimes requiring the administration of painkillers. These intestinal disorders are caused by a lack of exercise, as well as by aberrant eating behaviors induced by the boredom, inactivity, and emotional stress of captivity." CP 12.

The Complaint paints a vivid and disturbing picture of intelligent, social, complex animals suffering from an array of physical maladies and severe psychological trauma. The conditions of confinement in which the Elephants are being held are indisputably an ongoing violation of the law. It is the City's position, however, that even though it owns the inadequate Elephant Exhibit, is ultimately responsible for the Elephants, and hired and pays (indeed, effectively created) the "contractor" that manages their confinement, and is responsible for overseeing the work of that contractor,

it has done nothing illegal. The Superior Court's acceptance of this position was error.

**III. The Role of Nominative Third Party WPZS Does Not Insulate The City From Taxpayer Challenge.**

Ignoring its pervasive role in the creation and ongoing operation of the Elephant Exhibit, the City would have this Court focus exclusively on the only aspect of the Zoo that is not *directly* under the control of the City: its day-to-day management. CP 102. But the insertion of a nominal third party between the City and the abusive confinement of the Elephants does not insulate the City from taxpayer challenge.

Despite the City's protestations that the Plaintiffs are seeking to "expand" taxpayer standing, it is in fact the City that seeks to narrow the doctrine, and narrow it substantially. Controlling Washington Supreme Court precedent holds that taxpayer standing lies where the government agency relies on a third party to conduct the actual wrongful conduct. *Boyles*, 103 Wash. 2d at 614-15. Furthermore, the "third party" in this case is a third party in form only—it consists, in relevant part, of former City employees, who manage the City-owned Zoo, are paid in large part with the City's tax dollars, and are subject to substantial governance and oversight by City officials.

**A. A Government Entity Does Not Escape Taxpayer Challenge Simply By Outsourcing The Illegal Activity To Non-Government Employees.**

The Washington Supreme Court has held that taxpayer standing lies even where a non-governmental third party engages in the actual

wrongful conduct itself. In *Boyles*, the court considered a work release program incorporating religious studies. *Boyles*, 103 Wash. 2d at 612-13. The program was run by a church-supported organization, The Lighthouse Mission, and there were no allegations that the County had any control or influence over the content of the program. The County did not even directly fund the program—it merely assigned prisoners eligible for work-release (on what appears to have been a voluntary basis). *Id.* at 613-15. No County official conducted religious services or otherwise took any action promoting religion. Nonetheless, the court held that the taxpayer-plaintiffs could challenge the County’s assignment of prisoners to the program, on the grounds that the religious elements of the program violated the Establishment Clause of the United States Constitution and article 1, section 11 (amendment 34) of the Washington Constitution. *Id.* at 612, 615.

*Boyles* controls this appeal. Just as in *Boyles*, a government agency seeks to rely on a third party to perform services on its behalf. And just as in *Boyles*, the manner in which that third party conducts those services is unlawful. Indeed, the facts of this case lie well inside the taxpayer standing doctrine established by *Boyle*. In *Boyle*, the government did not fund or oversee the challenged program, it merely made use of it to fulfill a government function. Nonetheless, taxpayer standing was available to stop the government from using a provider to engage in activity, the establishment of religion, that the government could not itself

lawfully commit. Here, not only is the government attempting to rely on a third party to engage in conduct it may not lawfully commit itself, but it designed, built and owns the facility used by the third party, provided the third party with its employees and expertise, substantially funds, and is responsible for overseeing the third party's operations.

Nor can *Boyles* be distinguished on the grounds that the Establishment Clause presents a uniquely governmental illegality. It is true that the Mission program was not *per se* unlawful, unlike the Zoo's abuse of the Elephants. But in both cases, the government seeks to do something through a private party that it cannot do itself, and in both cases, taxpayer standing lies to reign in the government's overreach. The County in *Boyles* was not permitted to send prisoners to the Mission program because it had the effect of violating the Establishment Clause, and the City of Seattle cannot send the Elephants to the Zoo because it has the effect of violating the Animal Cruelty Laws. To hold otherwise would be to reach a profoundly absurd result—a taxpayer could sue the County because Mission staff prayed with the prisoners, but it could not sue if Mission staff beat the prisoners and locked them in cages.

Other cases support the conclusion that who writes the paycheck of the offending party has no bearing on taxpayer standing. Washington courts have not rested their finding of taxpayer standing on the presence of direct government action, and the effects of their rulings would be substantially undermined if reliance on contractors could evade taxpayer

review. In *Kightlinger*, for example, the court upheld a taxpayer challenge to a program by a Public Utility District whereby the District offered a repair service for major appliances, such as air-conditioners and ovens. *Id.* at 503. The court held that because the taxpayers were challenging the legality of the repair program, they had standing, and because the District's express authority did not encompass a repair operation, the program was unlawful. *Id.* at 508, 511. There is a reference in the court's opinion to the District's "employees" (*id.* at 505); it appears that the repair staff were government employees. Under the City's curtailed version of taxpayer standing, however, the District could have revived its repair program if it established a non-profit appliance repair entity, transferred its repair staff to the new entity, and contracted for repair services through that "contractor." To state the proposition is to reveal its absurdity, and this Court should not condone such a ruse here.

Other states are in accord. In *Vasquez v. State*, 105 Cal. App. 4th 849, 853 (2003), the California Court of Appeal considered a program established under Proposition 139 whereby state inmates were employed by private businesses at wages comparable to those earned by non-inmates. *Id.* at 851. One of the participating private businesses, CMT Blues, failed to pay inmates the prevailing wage for their work. *Id.* at 853. The State of California, making essentially the same argument made here by the City of Seattle, asserted that a taxpayer challenge did not lie where the misconduct was that of a third party. "The State also attempts to

distinguish *Harman* [*Harman v. City and County of San Francisco*, 7 Cal.3d 150 (1972)] and *Farley* [*Farley v. Cory* 78 Cal.App.3d 583 (1978)] on the ground it has unfettered *discretion* to allow CMT Blues to violate Proposition 139, and breach the joint venture agreement, by conducting its operation at [the prison] without paying inmates prevailing wages.” *Id.* at 856. The court rejected this argument as “without merit,” finding:

Contrary to the State’s view, it cannot sit idly by while CMT Blues violates Proposition 139 and the express terms of the joint venture agreement. . . . The State has means of obtaining CMT Blues’ compliance, or of ejecting it from the joint venture program absent compliance, and cannot ignore its duty to obtain compliance under the guise CMT Blues, not the State, is required to pay inmate wages.

*Id.*

Nor can the City rely on the Superior Court’s suggestion that by inserting the WPZS between it and the Zoo, the City has limited its conduct to “basically funding.” RP 17:9. As a general matter, of course, paying another party to commit a crime does not insulate the payer from liability. But more to the point, unlawful funding is precisely the sort of conduct that taxpayer standing exists to challenge. *See Chealander*, 131 Wash. at 148; *Cammack*, 932 F.2d at 770.

On the contrary, the Complaint makes it clear that funding is one of the aspects of the City’s conduct that gives rise to taxpayer standing. From the first sentence, the Complaint asserts that this funding is improper and is the basis for challenge. “Mary Sebek and Nancy Farnam (“Plaintiffs”) bring this action as taxpayers to compel the City of Seattle (the “City”) to cease its waste and unlawful use of City funds to support

ongoing illegal conduct at the Zoo.” CP 1. *See also id.* at 2 (“Plaintiffs seek to halt the City’s financial support of the Zoo’s ongoing unlawful cruelty.”). The relief sought is similarly focused on the illegal expenditures: “Entry of injunctive relief ordering the City to cease: (1) providing funds to the Zoo and Zoo Society[.]” CP 15. The Complaint frames the quintessential taxpayer standing claim: taxpayers challenging the expenditure of their tax dollars on the grounds that the expenditure is illegal.

Accordingly, the City has not insulated the abusive treatment of the Elephants by shifting its employees onto a third party’s payroll, especially where it continues to provide much of the funding necessary to make that payroll. Taxpayer standing protects taxpayer funds and curbs illegal government conduct—there is no authority and no rationale for excluding government conduct that is carried out through third parties from taxpayer challenge and judicial review.

**B. WPZS Is A De Facto City Agency.**

The City’s “third party” attack on Plaintiffs’ standing is not only legally invalid, it is not supported by the facts. The WPZS’s purported independence from the City is a matter of form, not substance. WPZS is a creature of the City government; the City’s Zoo department operating outside, but never beyond the reach, of City Hall.

Washington courts have consistently explained that they will always “look through the form of [a] transaction and consider its substance.” *Whitaker v. Spiegel, Inc.*, 95 Wash. 2d 661, 669, 623 P.2d

1147 (1981) (quoting *Hafer v. Spaeth*, 22 Wash. 2d 378, 383, 156 P.2d 408 (1945)); *see also Morrison v. Nelson*, 38 Wash. 2d 649, 657-58, 231 P.2d 335 (1951); *Am. Sav. Bank & Trust Co. v. Helgesen*, 67 Wash. 572, 574, 122 P. 26 (1912). Mere legal terminology or formality must give way “to economic reality and to [the] substance” of a given transaction. *See Sauve v. K.C.*, 19 Wash. App. 659, 665, 577 P.2d 599 (1978).

The WPZS’s management of the Zoo and its relationship with the City is the result of a decision by the City a decade ago to shift its Zoo operations off the City’s books and into a quasi-independent entity. In 2002, the City employed approximately 170 people to run its Zoo. CP 177. Secondary functions, such as public relations, fund-raising, and marketing, were already handled by the WPZS, a non-profit entity established many years before. CP 160-162. By virtue of the Management Agreement, however, those 170 employees were shifted onto the WPZS’s payroll (or given the option of taking alternative employment with the City), in exchange for over five million dollars in annual funding from the City.

Although the City no longer directly employs the staff of the Zoo, it maintains substantial operational control over the Zoo—WPZS is a largely captive entity, carrying out a municipal function with public funds and under public oversight. WPZS is required to provide monthly, quarterly, and annual reports and plans to the City, CP 180-181, and the City has the authority to audit the Zoo Society’s records. CP 181-182.

WPZS is required to comply with all applicable laws, CP 189, and the City has the contractual authority to terminate the Management Agreement for lack of compliance with this requirement. CP 185-186. WPZS cannot increase admissions charges beyond the rate of inflation, CP 174, and it must use all revenue for Zoo purposes, CP 179; it cannot change the name of the Zoo, CP 176; and City officials sit *ex officio* on the WPZS Board. CP 182. Although the zookeepers and other staff at the Zoo may not report directly to a City official, they are employed by an organization that is funded, audited, overseen and monitored by the City.

Indeed, the oversight provisions of the Management Agreement are obligated by state law: RCW 35.46.010(5) requires that when cities contract for the management of zoos, “the legislative authority of the city shall provide for oversight of the managing and operating entity.” The City’s failure to acknowledge and act upon the ongoing criminal violations by the “managing and operating entity” are a further breach of its obligations under the law.

The substantial funding the City provides and the close oversight authority it holds over the WPZS makes a mockery of the City’s assertion that an independent “contractor,” and not the City itself, is engaged in the illegal activities identified by the Plaintiffs. CP 224. The City has merely swapped its payroll expense for a service contract. *Cf. Tacoma Ass’n of Credit Men v. Lester*, 72 Wash. 2d 453, 456-58, 433 P.2d 901 (1967).

**IV. The City's Housing of Elephants At The Zoo Is Illegal In Itself, Regardless Of The WPZS's Misconduct.**

The Complaint makes clear that the Elephant Facility, which the City designed, built, and owns, is a substantial source of the unlawful suffering and pain inflicted upon the Elephants. CP 3, 7-8. (inadequacies of the Exhibit and the suffering and pain experienced therefrom), CP 8 (painful conditions resulting from the hard surfaces of the Elephant Exhibit), CP 11 (inadequate facility causes psychological harm). The management practices employed by the WPZS at the Zoo are themselves illegal, and substantially contribute to the Elephants' suffering and pain—but the Complaint establishes that the mere housing of the Elephants in this inadequate facility is illegal, and subject to challenge by taxpayers.

The City owns the zoo, it designed, built and owns an elephant facility in that zoo, and it pays a third party to keep elephants (to which the City retains ultimate title) in the facility. As a direct result of the size, layout, and construction of that facility, however, the elephants experience unnecessary suffering and pain, in violation of state and local criminal law. Were a private citizen engaged in this behavior, there is no doubt that the citizen would be subject to prosecution under those laws.

Accordingly, the City's continued use of scarce taxpayer resources in this fashion is illegal, and subject to legal challenge by its taxpayers. *See Chealander*, 131 Wash. at 148 (permitting “an action to enjoin the improper use” of taxpayer funds, because such funds are “collected from the taxpayers to be properly and lawfully expended for their benefit”).

**V. Permitting the City to Shield Its Unlawful Conduct Behind a Third Party Would Undermine Taxpayer Standing and Erode Essential Protections Against Government Overreach.**

Before the Superior Court, the City predicted a parade of horrors should the court engage in what it called “an unprecedented expansion of the doctrine of taxpayer standing.” CP 224. Of course, there is no “expansion,” unprecedented or otherwise, at issue here. Rather, the City apparently seeks to limit taxpayer standing to instances where government officials themselves engage in the challenged conduct directly.

Regardless, the Washington Supreme Court has repeatedly rejected the City’s policy argument against taxpayer standing. *Boyles*, 103 Wash. 2d at 614; *Calvary Bible*, 72 Wash. 2d at 917.

The City’s purported concern is that “every legal City contract would potentially become subject to taxpayer oversight in the courts, based on actions of persons or entities other than the City.” CP 224-225. Even at face value, this is not a compelling complaint—where the City is funding illegal activity, whether directly or through contract, the value of citizen oversight should be apparent. Regardless, the City substantially overstates the impact of taxpayer standing in this context. Taxpayers do not have the right to “scrutinize” “every legal City contract,” under this doctrine or any other. Rather, they can seek judicial review of city conduct where factual allegations establish that the conduct is illegal, and that the city is on notice as to that illegality, yet has failed to correct it. The City argues that it can evade this scrutiny by contracting with another

to provide the unlawful activity, but that loophole is not available to it, nor should it be.

Apparently in an attempt to clarify why it should be permitted to pay contractors to engage in illegal activity, the City suggested that, if taxpayer standing were recognized here, a taxpayer could bring an action against the City to enjoin the payment of rent where a landlord had committed a building code violation. CP 225. Again, this critique is far from compelling. Were the City to support, through its rent payments, the inadequate maintenance of a building whose gross electrical code violations were causing a danger to surrounding life and property, it is not clear why a taxpayer action to enjoin the further payment of rent money to the offending landlord should be disfavored. But the hypothetical, compelling or not, is completely inapposite. The WPZS is not an independent business that happens to have the City as a customer. It is managing City property for a public purpose, pursuant to a contract with the City, under the City's oversight, with the City's tax money.

Presumably, the City's "building code" hypothetical was offered to suggest that taxpayer standing exposes government agencies to petty harassment. But the City does not, and cannot assert that this case is a petty "building code violation" claim, and the Washington Supreme Court has been rejecting the City's *theoretical* argument for decades. Repeatedly it has made it clear that should the promised deluge of *de minimis* actions ever materialize, courts would be perfectly capable of

imposing reasonable limitations. For example, in *Fransen v. Board of Natural Resources*, 66 Wash. 2d 672, 404 P.2d 432 (1965), the court bluntly rejected the City's argument:

The defendants maintain that, if taxpayers are allowed to bring injunction actions against public officers, the administration of public affairs will be unduly hampered. They have not brought to our attention a case illustrative of this evil, and certainly the instant action is not an example of unwarranted harassment.

*Id.* at 677. See also *Boyle*, 103 Wash. 2d at 614 (“Only when [taxpayer standing] would encourage ‘unwarranted harassment’ of public officials have we implied that standing would be denied.”) (quoting *Calvary Bible*, 72 Wash. 2d at 917).

The City's position, on the other hand, poses its own threat to the citizen oversight granted through the taxpayer standing doctrine. A wealth of government services are today provided by contractors and other third parties, and Washington continues to look for ways to further privatize government services. (See Jordan Schrader, *State Budget Negotiators Look to Outsource Some Government Functions*, *The Olympian*, May 10, 2011, available at <http://www.theolympian.com/2011/05/10/1646131/wrangle-looms-on-privatization.html> (last visited August 28, 2011).) The City, including its Parks and Recreation Department, which oversees the Zoo, is also looking to privatize more services. (See Michael Harthorne, *City Considering Privatization to Keep Community Centers Open*, *Beacon Hill Komo News*, June 13, 2011, available at <http://beaconhill.komonews.com/news/public-spaces/city-considering-privatization-keep-community-centers-open/646782> (last visited August 28, 2011).) Privatization undoubtedly comes with costs and benefits, but one of those costs should

not be shielding illegal expenditure of taxpayer money from judicial review and taxpayer actions like this one.

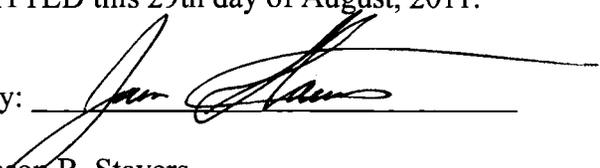
Taxpayer standing has a long history in Washington, and is an important bulwark against governmental overreach. The City offered, and the Superior Court identified, no authority for carving an exception from that well-established doctrine for illegal conduct undertaken by a third party on behalf of, and with the knowledge of, the government. Controlling Washington Supreme Court precedent precludes such a result, and the Superior Court's failure to follow that precedent was error.

### CONCLUSION

Plaintiffs respectfully request that the decision of the Superior Court be reversed and that Plaintiffs' action be reinstated.

RESPECTFULLY SUBMITTED this 29th day of August, 2011.

By: \_\_\_\_\_

  
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# APPENDIX

105 Cal.App.4th 849, 129 Cal.Rptr.2d 701, 03 Cal. Daily Op. Serv. 846, 2003 Daily Journal D.A.R. 1015  
 (Cite as: 105 Cal.App.4th 849)

**H**

CRISTINA VASQUEZ, Plaintiff and Appellant,  
 v.  
 THE STATE OF CALIFORNIA et al., Defendants  
 and Respondents.

No. D038889.

Court of Appeal, Fourth District, Division 1, Cali-  
 fornia.

Jan. 27, 2003.

**SUMMARY**

A union vice-president brought a taxpayer's action (Code Civ. Proc., § 526a) against the state and the assistant director of the joint ventures program in the Department of Corrections, seeking to compel defendants to discharge their duty under Prop. 139, the Prison Inmate Labor Initiative of 1990 (Pen. Code, § 2717.1 et seq.), to require an employer to pay prevailing wages to inmates. The trial court sustained defendants' demurrer without leave to amend and entered a judgment of dismissal, concluding that a taxpayer's action under Code Civ. Proc., § 526a, may not be based on the state's failure to collect funds. (Superior Court of San Diego County, No. GIC740832, William C. Pate, Judge.)

The Court of Appeal reversed. The court held that an action lies under Code Civ. Proc., § 526a, not only to enjoin wasteful public expenditures, but also to enforce the government's duty to collect funds that are due to the state. The court further held that the assistant director was a proper party to plaintiff's suit, since a taxpayer action under Code Civ. Proc., § 526a, may be brought against the government or any officer of the government. (Opinion by McConnell, J., with Benke, Acting P. J., and Nares, J., concurring.)

**HEADNOTES**

Classified to California Digest of Official Reports  
 (1) Appellate Review § 128--Scope of Review--  
 -Function of Appellate Court-- Rulings on Demur-

ners.

In reviewing the propriety of a trial court's sustaining of a demurrer, the appellate court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. The judgment must be affirmed if any one of the several grounds of demurrer is well taken. However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. The appellate court reviews the trial court's ruling de novo.

**(2) Public Funds § 6--Illegal Expenditures--Taxpayer's Actions.**

The purpose of Code Civ. Proc., § 526a (taxpayer's action), which applies to citizen and corporate taxpayers alike, is to permit a large body of persons to challenge wasteful government action that otherwise would go unchallenged because of the standing requirement. Although by its terms the statute applies to local governments, it has been judicially extended to all state and local agencies and officials. The individual citizen must be able to take the initiative through a taxpayer's suit to keep government accountable on both the state and the local levels.

**(3) Penal and Correctional Institutions § 19--Prisons and Prisoners-- Convict Labor Programs--Proposition 139--Taxpayer's Action to Require Employer to Pay Prevailing Wages:Public Funds § 6--Illegal Expenditures.**

In a taxpayer's action (Code Civ. Proc., § 526a) by a union vice-president against the state and the assistant director of the joint ventures program in the Department of Corrections, the trial court erred in sustaining defendants' demurrer without leave to amend on the ground that a taxpayer's action under Code Civ. Proc., § 526a, may not be based on the state's failure to collect funds. Plaintiff sought to compel defendants to discharge their duty under Prop. 139, the Prison Inmate Labor Initiative of 1990 (Pen. Code, § 2717.1 et seq.), to require an employer to pay prevailing wages to inmates. A

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taxpayer's action under Code Civ. Proc., § 526a, lies not only to enjoin wasteful public expenditures, but also to enforce the government's duty to collect funds that are due to the state. The state was obligated to correct the employer's violation of Prop. 139. Further, the assistant director was a proper party to plaintiff's suit, since a taxpayer action under Code Civ. Proc., § 526a, may be brought against the government or any officer of the government.

[See 4 Witkin, Cal. Procedure (4th ed. 1997) Pleading, § 144 et seq.; West's Key Number Digest, States ¶ 168.5.]

COUNSEL

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\*851

#### McCONNELL, J.

Plaintiff Cristina Vasquez appeals a judgment of dismissal entered after the court sustained without leave to amend the demurrer of defendants the State of California and Noreen Blonien (together the State when appropriate). We reverse the judgment and hold, as a matter of first impression, that a taxpayer action (Code Civ. Proc., <sup>FN1</sup> § 526a) may be brought to compel the State to discharge its duty under Proposition 139, the Prison Inmate Labor Initiative of 1990, to require a private sector manufacturer's payment of *prevailing* wages to inmates, given the State's right to a percentage of inmates' wages to defray expenses of their room and board.

FN1 Statutory references are to the Code of Civil Procedure unless otherwise specified.

#### Factual and Procedural Background

A discussion of legal provisions is required to

place the facts in context. In November 1990 the voters approved Proposition 139 (codified in Pen. Code, § 2717.1 et seq.), which requires the Director of Corrections (the Director) to “establish joint venture programs within state prison facilities to allow joint venture employers [private businesses] to employ inmates confined in the state prison system for the purpose of producing goods or services.” (Pen. Code, § 2717.2.) The purposes of Proposition 139 are to (1) require inmates to “work as hard as the taxpayers who provide for their upkeep,” (2) provide funds from which inmates can reimburse the State for a portion of their costs of incarceration, satisfy restitution fines and support their families, and (3) assist in inmates' rehabilitation and teach skills they may use after their release from prison. (Historical and Statutory Notes, 51B West's Ann. Pen. Code (2000 ed.) foll. § 2717.1, p. 223.)

Proposition 139 requires a private business to pay inmates compensation “comparable to wages [it] paid ... to non-inmate employees performing similar work for that employer. If the joint venture employer does not employ such non-inmate employees in similar work, compensation shall be comparable to wages paid for work of a similar nature in the locality in which the work is to be performed” (prevailing wages). (Pen. Code, § 2717.8.)

An inmate's wages “shall be subject to deductions, as determined by the Director ..., which shall not, in the aggregate, exceed 80 percent of gross wages and shall be limited to the following: ¶ (1) Federal, state and local \*852 taxes[;] [¶] (2) Reasonable charges for room and board ...[;] [¶] (3) Any lawful restitution fine or contributions to any fund established by law to compensate the victims of crime of not more than 20 percent, but not less than 5 percent, of gross wages ...[;] [and] [¶] (4) Allocations for support of family pursuant to state statute, court order, or agreement by the prisoner.” (Pen. Code, § 2717.8.)

The Director is required to “prescribe by rules and regulations provisions governing the operation and implementation of joint venture programs,

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which shall be in furtherance of the findings and declarations” in Proposition 139. (Pen. Code, § 2717.3.) Under these regulations, the Director shall select a joint venture employer on the basis of its ability to further the purposes of Proposition 139. In making the determination, the Director shall consider certain factors, including the prospective employer's ability to provide inmates with the means of paying a portion of the cost of their room and board. (Cal. Code Regs., tit. 15, § 3481, subd. (a)(1).) Further, each joint venture agreement shall include the “comparable wages of job classifications as determined in cooperation with the Employment Development Department” (EDD). (Cal. Code Regs., tit. 15, § 3482, subd. (a)(3).) The Director has determined that “20% of the inmate's net wages after taxes shall be for costs of room and board which shall be remitted to the facility's account.” (Cal. Code Regs., tit. 15, § 3483, subd. (d)(3).)

In February 1996 the Department of Corrections (the Department) entered into a joint venture agreement with CMT Blues, for its manufacture of clothing at the Richard J. Donovan Correctional Facility (Donovan). The Department is required to select inmates for work and oversee their participation, maintain the work premises and provide utilities, security and discipline. CMT Blues is required to provide raw materials, machinery and equipment. CMT Blues is also required to pay inmates “in accordance with [EDD] guidelines developed for this contract.” The contract incorporates by reference EDD wage guidelines for silk screen painters, sewing machine operators and garment parts cutters. FN2

FN2 The guidelines are not included in the appellate record.

Under a separate agreement, CMT Blues leases from the State approximately 28,000 square feet of space at Donovan for \$1,000 per month. The lease provides that either party may terminate the lease for a material breach, which includes the failure to comply with the joint venture agreement, e.g., the

failure to pay inmates prevailing wages. \*853

Vasquez brought a taxpayer action under section 526a against the State. FN3 Vasquez alleged that “through at least the Fall of 1997” inmates working for CMT Blues “were not paid any compensation ... unless and until they had completed an initial unpaid period of at least thirty working days and, on occasion, sixty days,” and “through the present” have not been paid prevailing wages. Vasquez alleged taxpayers have not received the benefits contemplated by Proposition 139, in that “[f]unds required to have been collected and disbursed [from inmates' pay] will not be disbursed ... to the victims of crime, for family and child support of inmates [and] for the reimbursement for the costs of incarceration.” Vasquez sought to compel the State to ensure CMT Blues' payment of prevailing wages to the inmates.

FN3 Vasquez “is International Vice President for the Union of Needletrades, Industrial & Textile Employees,” which was a plaintiff, but is not involved in this appeal. Vasquez named CMT Blues and several parties as defendants, but they are also not involved in this appeal. The taxpayer cause of action at issue is the ninth cause of action of Vasquez's fourth amended complaint, the only claim remaining against the State when it filed its demurrer.

The State successfully demurred to the fourth amended complaint. The court determined a taxpayer action under section 526a requires the actual or threatened *expenditure* of funds, and may not be based on the State's failure to collect funds. The court also found the State's expenditures to implement Proposition 139 do not support a section 526a action because they are not illegal or wasteful. A judgment of dismissal was entered on January 3, 2002.

#### Discussion

##### I. *Standard of Review*

(1) In reviewing the propriety of the sustaining

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of a demurrer, the “court gives the complaint a reasonable interpretation, and treats the demurrer as admitting all material facts properly pleaded. [Citations.] ... The judgment must be affirmed 'if any one of the several grounds of demurrer is well taken. [Citations.]' [Citation.] However, it is error for a trial court to sustain a demurrer when the plaintiff has stated a cause of action under any possible legal theory. [Citation.]” ( *Aubry v. Tri-City Hospital Dist.* (1992) 2 Cal.4th 962, 967 [9 Cal.Rptr.2d 92, 831 P.2d 317].) We review the court's ruling de novo. ( *Lazar v. Hertz Corp.* (1999) 69 Cal.App.4th 1494, 1501 [82 Cal.Rptr.2d 368].) \*854

## II. Section 526a

### A

(2) The purpose of section 526a, FN4 “which applies to citizen and corporate taxpayers alike, is to permit a large body of persons to challenge wasteful government action that otherwise would go unchallenged because of the standing requirement. [Citation.] ... [A]lthough by its terms the statute applies to local governments, it has been judicially extended to all state and local agencies and officials. [Citations.]” ( *Waste Management of Alameda County, Inc. v. County of Alameda* (2000) 79 Cal.App.4th 1223, 1240 [94 Cal.Rptr.2d 740] ( *Waste Management*).) “ [T]he individual citizen must be able to take the initiative through taxpayers' suits to keep government accountable on the state as well as on the local level.’ [Citation.]” ( *Farley v. Cory* (1978) 78 Cal.App.3d 583, 589 [144 Cal.Rptr. 923] ( *Farley*).)

FN4 Section 526a provides in part: “An action to obtain a judgment, restraining and preventing any illegal expenditure of, waste of, or injury to, the estate, funds, or other property of a county, town, city or city and county of the state, may be maintained against any officer thereof, or any agent, or other person, acting in its behalf, either by a citizen resident therein, or by a corporation, who is assessed for and is li-

able to pay, or, within one year before the commencement of the action, has paid, a tax therein.”

(3) The trial court relied on the following quote from Witkin: “The essence of a taxpayer action is an illegal or wasteful expenditure of public funds or damage to public property. It must involve an actual or threatened expenditure of public funds. General allegations, innuendo, and legal conclusions are not sufficient; rather, the plaintiff must cite specific facts and reasons for a belief that some illegal expenditure or injury to the public fisc is occurring or will occur.” (4 Witkin, Cal. Procedure (2002 supp.) Pleading, § 144, p. 39, citing *Waste Management, supra*, 79 Cal.App.4th at p. 1240, italics added.)

It is established that an action lies under section 526a not only to enjoin wasteful expenditures, but also to enforce the government's duty to collect funds due the State. “ 'A taxpayer may sue a governmental body in a representative capacity in cases involving [its] ... failure ... to perform a duty specifically enjoined.’ [Citation.] This well-established rule ensures that the California courts, by entertaining only those taxpayers' suits that seek to measure governmental performance against a legal standard, do not trespass into the domain of legislative or executive discretion. [Citations.] This rule similarly serves to prevent the courts from hearing complaints \*855 which seek relief that the courts cannot effectively render; the courts cannot formulate decrees that involve the exercise of indefinable discretion; their decrees can only restrict conduct that can be tested against legal standards. [Citations.]” ( *Harman v. City and County of San Francisco* (1972) 7 Cal.3d 150, 160-161 [101 Cal.Rptr. 880, 496 P.2d 1248] ( *Harman*), fn. omitted.)

In *Harman, supra*, 7 Cal.3d 150, the city's charter provided that “ '[n]o sale [of vacated streets] other than a sale at public auction shall be authorized by the supervisors unless the sum offered shall be at least ninety percent of the preliminary appraisal of such property.’ ” ( *Id.* at p. 164.) The taxpayer plaintiffs alleged the city violated the provi-

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sion by selling vacated streets at 50 percent of their unencumbered fee value, and the failure to abide by the charter and collect increased revenues constituted a gift of public funds. The Supreme Court held the plaintiffs stated a cause of action under section 526a. (*Harman*, at pp. 160, fn. 1, 168-169.)

In *Farley*, *supra*, 78 Cal.App.3d 583, the taxpayer plaintiffs alleged the State Controller “failed properly to perform the duties of his office pursuant to the Unclaimed Property Law ... in allowing banking organizations to deduct service charges and to cease payment of interest on dormant accounts which eventually ‘escheat’ to the state” (*id.* at p. 585, fn. omitted, italics added), and the “Controller’s failure to perform his duties was to confer a gift of public funds on the banking organizations.” (*Ibid.*) The plaintiffs “sought an order compelling the Controller to conduct an examination and audit of banking organizations with respect to funds subject to escheat, to collect unpaid funds with interest retroactively applied, to enjoin the banking organizations from terminating interest payments and imposing ‘unreasonable’ service charges, [and] to issue rules and regulations to prevent unlawful and abusive practices by the banking organizations.” (*Id.* at pp. 585-586.)

The court held the plaintiffs stated a cause of action based on the Controller’s *inaction*. The court noted that Code of Civil Procedure section 1560 (formerly Code Civ. Proc., § 1513) protects the State by declaring its ownership of unclaimed savings and similar deposits together with interest and dividends, and Government Code section 12418 commands the Controller to collect funds due the State. The court concluded “a California taxpayer has a justiciable interest in money belonging to the state. [Citation.] That holds true whether the money is in the treasury and about to be illegally spent or whether the money is in the hands of a third person but belongs to the state.... [¶] Underlying California’s affirmative response to the question of taxpayers’ standing is the confidence expressed in decisional law that governmental performance, com-

manded by statute, is measurable and thus amenable to judicial redress. [Citations.]” (*Farley*, *supra*, 78 Cal.App.3d at p. 589, italics added.) \*856

The State asserts *Harman* and *Farley* are “easily distinguished” because they “involved spending for an illegal or inappropriate activity.” (Boldface type omitted.) That is not so. As discussed, they concerned the government’s failure to obtain the correct or full amount of funds due the State. The State also attempts to distinguish *Harman* and *Farley* on the ground it has unfettered discretion to allow CMT Blues to violate Proposition 139, and breach the joint venture agreement, by conducting its operation at Donovan without paying inmates prevailing wages. The State’s position is without merit.

Among other purposes, Proposition 139 is intended to defray the costs of inmates’ room and board. (Historical and Statutory Notes, 51B West’s Ann. Pen. Code, *supra*, foll. § 2717.1, p. 223.) Under the Director’s regulations, the State is entitled to 20 percent of inmate wages. Proposition 139 requires the joint venture employer’s payment of prevailing wages to inmates, and in considering whether to enter into a joint venture agreement the Director is required to consider the prospective employer’s ability to pay prevailing wages.

Contrary to the State’s view, it cannot sit idly by while CMT Blues violates Proposition 139 and the express terms of the joint venture agreement. Indeed, under the Departments’ operations manual “[t]he Assistant Director of the Joint Venture Program Unit ... is responsible for ensuring the Department’s compliance with the mandates and intent of” Proposition 139. The State has means of obtaining CMT Blues’ compliance, or of ejecting it from the joint venture program absent compliance, and cannot ignore its duty to obtain compliance under the guise CMT Blues, not the State, is required to pay inmate wages.

The statutory underpinning of the State’s duty to taxpayers to protect the public fisc is at least as

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compelling as in *Harman* and *Farley*. The State's conduct can be tested against legal standards, and the court may render an effective decree to obtain its compliance with Proposition 139. Vasquez stated a taxpayer cause of action under section 526a against the State, and the court erred by granting its demurrer and dismissing the fourth amended complaint. <sup>FN5</sup> \*857

FN5 The State asserts that should we reverse the judgment, "it takes little imagination to forecast the havoc that could be wreaked upon government activities." The State predicts, for instance, that "[p]olice departments that fail to enforce traffic laws at their discretion could be subject to injunction on the grounds that further spending on them constitutes 'waste.'" However, we have made clear that the State has no discretion to allow a joint venture employer to violate Proposition 139 and a joint venture agreement by failing to pay prevailing wages. Moreover, contrary to the State's assertion, our holding is not an "extension of the law [section 526a] that will be difficult to restrain." We are not expanding the scope of section 526a; we follow precedent in requiring the State to comply with its legally measurable duties.

#### B

The State contends the judgment should be affirmed as to Blonien because she is not a signatory to the joint venture agreement and "has no standing to enforce the agreement." We are unpersuaded.

Vasquez alleged on information and belief that Blonien "is, and at all times material herein was, the assistant director of the ... Department ... Joint Venture Program, located in Sacramento, California.... At all times relevant and material to this complaint, ... Blonien was acting under the color of state law and pursuant to her authority as an assistant director with the [Department]." Under the Department's operations manual, the Assistant Director of the Joint Venture Program Unit is responsible

for the Department's compliance with Proposition 139. A taxpayer action under section 526a may be brought against the government or "any officer thereof." Regardless of who signed the joint venture agreement on the State's behalf, Blonien is a proper party to Vasquez's suit.

#### Disposition

The judgment is reversed. Vasquez is awarded costs on appeal.

Benke, Acting P. J., and Nares, J., concurred. \*858

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COURT OF APPEALS DIVISION I OF THE STATE OF WASHINGTON

MARY SEBEK and NANCY FARNAM,  
Plaintiffs-Appellants,

No. 10-2-23013-1 SEA  
No. 67301-7

v.

CITY OF SEATTLE and DOES 1 through 10,  
Defendants-Respondents,

**DECLARATION OF SERVICE**

and

WOODLAND PARK ZOOLOGICAL  
SOCIETY,

Defendant-Intervenor.

I, Jason Stavers, declare under penalty of perjury under the laws of the State of Washington, as follows:

1. I am an attorney with the law firm of Gibson, Dunn & Crutcher LLP.
2. On August 31, 2011, I caused copies of the **Principal Corrected Brief of Plaintiffs-Appellants Mary Sebek and Nancy Farnam** to be served via email, and via mail, postage prepaid, on the persons named below at the addresses shown:

Gregory Narver  
Email: Gregory.Narver@seattle.gov  
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PO Box 94769  
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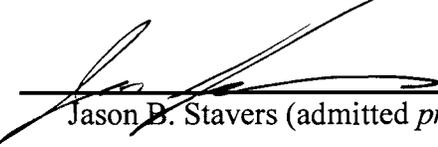
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*Counsel for Intervenor Woodland Park  
Zoological Society*

7 I declare under penalty of perjury under the laws of the State of Washington that the  
8 foregoing is true and correct.

9 Dated this 31st day of August, 2011.

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12 Jason B. Stavers (admitted *pro hac vice*)  
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