

FILED  
Court of Appeals  
Division II  
State of Washington  
2/19/2019 4:52 PM  
No. 52664-6-II

---

IN THE COURT OF APPEALS FOR THE STATE OF  
WASHINGTON  
DIVISION II

---

TAYLOR BLACK, et al.,

Plaintiffs-Appellants,

v.

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY,  
and  
STATE OF WASHINGTON,

Defendants-Respondents.

---

**BRIEF OF RESPONDENT SOUND TRANSIT**

---

PACIFICA LAW GROUP LLP  
Paul J. Lawrence, WSBA #13557  
Matthew J. Segal, WSBA #29797  
Athanasios P. Papailiou, WSBA #47591  
1191 2<sup>nd</sup> Avenue, Suite 2000  
Seattle, WA 98101  
206-245-1700

CENTRAL PUGET SOUND REGIONAL  
TRANSIT AUTHORITY  
Desmond L. Brown, WSBA #16232  
Mattelyn L. Tharpe, WSBA #53743  
Natalie A. Moore, WSBA #45333  
401 S Jackson St  
Seattle, WA 98104  
206-398-5000

*Attorneys for Respondent Central Puget Sound Regional Transit  
Authority*

## TABLE OF CONTENTS

	Page
I. INTRODUCTION .....	1
II. COUNTERSTATEMENT OF FACTS.....	4
a. Sound Transit’s History.....	4
b. Sound Transit’s MVET .....	5
c. In 2015, the Legislature granted Sound Transit authority to seek voter approval of a new MVET with specified depreciation schedules. ....	8
d. Voters approve the ST3 Plan and the proposed MVET. ....	11
e. Eliminating the MVET would delay critical transit projects and increase costs.....	12
f. Procedural History .....	13
III. COUNTERSTATEMENT OF ISSUES .....	13
IV. ARGUMENT .....	14
a. Standard of Review .....	14
b. RCW 81.104.160(1) does not violate art. II, § 37. ....	15
i. An act’s compliance with art. II, § 37 is determined by applying a two-prong test.....	15
ii. RCW 81.104.160(1) is a complete act that satisfies the first prong of the art. II, § 37 test. ....	17
iii. The Supreme Court has repeatedly upheld the use of a notwithstanding clause as a valid means to comply with art. II, § 37. ....	19
iv. No cases support Black’s argument that reference to the 1996 depreciation schedule renders RCW 81.104.160(1) incomplete. ....	23
v. The cases Black cite do not support their argument that RCW 81.104.160(1) fails the second prong of the art. II, § 37 test.....	29

vi.	Legislative history is relevant to determine compliance with art. II, § 37. ....	31
V.	CONCLUSION.....	32

## TABLE OF AUTHORITIES

Page(s)

### Federal Cases

<i>Blakely v. Wash.</i> , 542 U.S. 296, 124 S. Ct. 2531, 159 L. Ed. 2d. 403 (2004).....	2
--	---

### Washington Cases

<i>Amalgamated Transit Union Local 587 v. State</i> , 142 Wn.2d 183, 11 P.3d 762 (2000).....	15, 16, 19
<i>Brower v. State</i> , 137 Wn.2d 44, 969 P.2d 42 (1998).....	29
<i>Citizens for Responsible Wildlife Mgmt. v. State</i> , 149 Wn.2d 622, 71 P.3d 644 (2003).....	17, 18, 32
<i>El Centro De La Raza v. State</i> , 192 Wn.2d 103, 428 P.3d 1143 (2018).....	passim
<i>Flanders v. Morris</i> , 88 Wn.2d 183, 558 P.2d 769 (1977).....	16, 29, 31
<i>Gruen v. State Tax Comm'n</i> , 35 Wn.2d 1, 211 P.2d 651 (1949).....	14
<i>Holzman v. City of Spokane</i> , 91 Wash. 418, 157 P. 1086 (1916).....	17
<i>In re A. W.</i> , 182 Wn.2d 689, 344 P.3d 1186 (2015).....	14
<i>Knowles v. Holly</i> , 82 Wn.2d 694, 513 P.2d 18 (1973).....	24
<i>Lewis v. Boehm</i> , 89 Wn. App. 103, 947 P.2d 1265 (1997) .....	15

<i>Local No. 497 v. Public Utility District No. 2 of Grant Cty.</i> , 103 Wn.2d 786, 698 P.2d 1056 (1985).....	27
<i>Pierce Cty. v. State</i> , 159 Wn.2d 16, 148 P.3d 1002 (2006).....	passim
<i>Retired Public Employees Council of Wash. v. Charles</i> , 148 Wn.2d 602, 62 P.3d 470 (2003).....	passim
<i>Rosell v. Dep't of Social and Health Services</i> , 33 Wn. App. 153, 652 P.2d 1360 (1982) .....	26
<i>Sheehan v. Central Puget Sound Regional Transit Authority</i> , 155 Wn.2d 790, 123 P.3d 88 (2005).....	18, 19
<i>Spokane Grain &amp; Fuel Co. v. Lyttaker</i> , 59 Wash. 76, 109 P. 316 (1910).....	16
<i>State ex rel. Wash. State Fin. Comm. v. Martin</i> , 62 Wn.2d 645, 384 P.2d 833 (1963).....	14
<i>State ex rel. Wash. Toll Bridge Auth. v. Yelle</i> , 32 Wn.2d 13, 200 P.2d 467 (1948).....	23, 24
<i>Local No. 497 v. PUD No.2</i> , 103 Wn.2d 786, 698 P.2d 1056 (1985).....	27
<i>Rosell v. Dep't of Social and Health Services</i> , 33 Wn. App. 153, 652 P.2d 1360 (1982) .....	26
<i>State v. Evergreen Freedom Found.</i> , -- Wn.2d --, 432 P.3d 805 (Jan. 10, 2019).....	14, 15
<i>State v. Manussier</i> , 129 Wn.2d 652, 921 P.2d 473 (1996).....	passim
<i>State v. Sam</i> , 538 P.2d 1209 (1975).....	26, 27
<i>State v. Thorne</i> , 129 Wn.2d 736, 921 P.2d 514 (1996).....	passim

<i>Wash. Educ. Ass'n v. State</i> , 97 Wn.2d 899, 652 P.2d 1347 (1982).....	15, 16
<i>Wash. Educ. Ass'n v. State</i> , 93 Wn.2d 37, 604 P.2d 950 (1980).....	30, 31
<i>Wash. Fed. Sav. &amp; Loan Ass'n v. Alsager</i> , 165 Wn. App. 10, 266 P.3d 905 (2011) .....	15
<i>Wash. Off Highway Vehicle All. v. State</i> , 176 Wn.2d 225, 290 P.3d 954 (2012).....	14

### Other Cases

<i>People ex rel. Drake v. Mahaney</i> , 13 Mich. 481 (1865).....	16
<i>Warren v. Crosby</i> , 24 Or. 558, 34 P. 661 (1893).....	16

### State Statutes

Const. art. I, § 23 .....	6, 7
Const. art. II, § 37 .....	passim
RCW 19.27.031 .....	24
RCW 28A.58.010.....	30
RCW 41.26.450 .....	21
RCW 41.40.650 .....	21
RCW 41.56.060 .....	23
RCW 43.155.060 .....	24
RCW 53.12.260 .....	24

RCW 81.104.160 .....	passim
RCW 81.106.160 .....	10
RCW 81.112.030 .....	11
RCW 82.044.035 .....	6
RCW 82.044.041 .....	6, 7
RCW 82.14B.020 .....	24
RCW 82.44 .....	20, 28, 30
RCW 82.44.035 .....	passim
RCW 82.44.041 .....	passim
RCW 9.94A.120 .....	21

#### **Other Authorities**

Laws of 2000, 2d Spec. Sess., ch. 1, § 906.....	21
Laws of 2006, ch. 318, § 1 .....	6
Laws of 2010, ch. 161, § 903.....	7, 27, 33
Laws of 2015, 3d Spec. Sess., ch. 44, § 319.....	1
<u>Senate Law and Justice Committee, Work Session: Sound Transit Investigation (Sept. 26, 2017) at 20:29, <a href="https://www.tvw.org/watch/?eventID=2017091061">https://www.tvw.org/watch/?eventID=2017091061</a> (last accessed Feb. 19, 2019) .....</u>	10
Sound Transit, Resolution No. R2008-11, <a href="https://www.soundtransit.org/st_sharepoint/download/sites/PRDA/FinalRecords/Resolution%20R2008-11.pdf">https://www.soundtransit.org/st_sharepoint/download/sites/PRDA/FinalRecords/Resolution%20R2008-11.pdf</a> .....	4

## I. INTRODUCTION

In 2016, local taxpayers voted to increase their motor vehicle excise tax (“MVET”) to fund more light-rail, commuter-rail, and express-bus service in heavily congested traffic areas in King, Pierce, and Snohomish Counties. Appellants, Taylor Black, et al. (“Black”), seek to overturn the election results. Specifically, Black asserts that RCW 81.104.160(1)<sup>1</sup>, which authorized Respondent Sound Transit<sup>2</sup> to propose, and voters to approve, an increased MVET, violates art. II, § 37 of the Washington Constitution. RCW 81.104.160(1), however, is a complete act that fully sets forth all the information necessary to authorize a new MVET: the purpose of the tax, the voter approval process, the maximum rate, and the specific the motor vehicle depreciation schedules to be used at different times. Thus, it satisfies the first prong of the Supreme Court’s art. II, § 37 test. Moreover, the act explains that the specified vehicle depreciation schedules are to be used “notwithstanding” other schedules that might exist in chapter 82.44 RCW. The Supreme Court approved use of such limiting clauses beginning with the word “notwithstanding” as a means to make clear the relation between a new act (here, the specific schedules the Legislature authorized Sound Transit to use) and an existing act (here, a schedule adopted in 2006 that would continue to apply to other local MVETs). Thus, the “notwithstanding” clause explaining the new act’s impact on the existing act satisfies the second prong of the art. II, § 37 test. Because RCW 81.104.160(1) is a complete act and clearly explains its relationship to other effected statutes, art. II, § 37 is not violated.

---

<sup>1</sup> Enacted as section 319(1) of ESSB 5987. Laws of 2015, 3d Spec. Sess., ch. 44, § 319(1). Because ESSB 5987 was codified more than three years ago, Sound Transit refers to the RCW citation herein.

<sup>2</sup> Sound Transit is the common name for the Central Puget Sound Regional Transit Authority.

None of Black's arguments have merit. First, Black argues that because the vehicle depreciation schedule in effect in 1996 was allegedly repealed by Initiative 776, it cannot be referenced in the newly enacted RCW 81.104.160(1). The argument is factually and legally wrong. With respect to Sound Transit's MVET, the 1996 depreciation schedule was never repealed and remains valid and legally enforceable pursuant to the Supreme Court's decision in *Pierce County v. State*, 159 Wn.2d 16, 51, 148 P.3d 1002 (2006) ("*Pierce County*"). Sound Transit has used the 1996 depreciation schedule since it began collecting the MVET in 1997, continues to use it today, and is legally required to use the 1996 schedule until the bonds to which the MVET are pledged are paid off in 2028. Moreover, there is no case law supporting Black's premise that a newly enacted statute cannot reference a source of information simply because that source cannot be found in the current RCW. Indeed, consistent with the purpose of reference statutes to eliminate the need to make statutes unusably long, a newly enacted statute can refer to an existing statute, a repealed statute, or another external source, such as the International Building Code, and still be deemed a complete law for purposes of art. II, § 37.

Second, Black argues that RCW 81.104.160(1) unconstitutionally revises the rights and duties in chapter 82.44 RCW. But the Supreme Court has stated: "Article II, Section 37 is not violated when complete acts incidentally or impliedly amend prior acts." *State v. Thorne*, 129 Wn.2d 736, 756, 921 P.2d 514 (1996), *abrogated on other grounds by Blakely v. Wash.*, 542 U.S. 296, 1245 S. Ct. 2531, 159 L. Ed. 2d 403 (2004). As noted above, RCW 81.104.160(1) uses the term "notwithstanding", which the Supreme Court approved as a proper means to incidentally or impliedly modify or

temporarily displace provisions in prior acts without violating art. II, § 37. See *State v. Manussier*, 129 Wn.2d 652, 665, 921 P.2d 473 (1996); *Thorne*, 129 Wn.2d at 756; *Retired Pub. Emp. Council of Wash. v. Charles*, 148 Wn.2d 602, 633-34, 62 P.3d 470 (2003). Black's efforts to distinguish these cases ignore the key point: they all concerned new statutes that referenced an existing statute whose application was being suspended or impliedly or incidentally amended in a particular circumstance, while leaving the existing statute otherwise in place. Thus, the depreciation schedule in chapter 82.44 RCW applies to any local MVET not covered by specific facts set forth in notwithstanding clause in RCW 81.104.160(1). Indeed, the schedule in chapter 82.44 RCW will apply to the Sound Transit MVET after the existing bond debt is paid.

Moreover, chapter 82.44 RCW does not create substantive rights or duties. It does not grant authority to any local government to adopt or use an MVET. Rather, it sets forth a schedule that can be used in conjunction with another statute that authorizes a local MVET. A person reading chapter 82.44 RCW would not see or learn anything about the Sound Transit MVET, or any other statute authorizing a local MVET. Chapter 82.44 RCW does not address the purposes for which a local MVET can be used, the process for approval, or the tax rate. No person reading chapter 82.44 RCW can be confused about its effect because reading it alone provides no information about any specific MVET.

The trial court correctly granted Sound Transit summary judgment concluding RCW 81.104.160(1) satisfied the two-prong test for determining whether a statute violates art. II, § 37. CP 1436-39. Its decision should be affirmed.

## II. COUNTERSTATEMENT OF FACTS

### a. Sound Transit's History

In 1993, King, Pierce, and Snohomish Counties created Sound Transit to build a regional-transit system. CP 410. The agency is governed by 18 board members (17 elected officials appointed from the three counties and the Secretary of Transportation). *Id.* In 1996, voters approved a 0.3% motor-vehicle excise tax and a 0.4% sales tax to fund the *Sound Move* transit plan. CP 406, 1223. The plan funded commuter-rail service to twelve cities from Tacoma to Everett, a 16-station light-rail line from SeaTac Airport to the University of Washington, light rail in downtown Tacoma, and express-bus service connecting 28 cities. See CP 766-67.

In 2008, voters approved a second tax package to fund the Sound Transit 2 Plan ("ST2"), which adds 36 miles of light rail, and more commuter-rail and express-bus service. CP 411. ST2 extends light rail from Seattle south to Federal Way, north to Lynwood, and east to Bellevue and Redmond, and from downtown Tacoma to the Hilltop Neighborhood. *Id.* That package increased the sales tax by 0.5% and authorized any surplus revenue generated by the 0.3% MVET approved in 1996 to be used to fund ST2. See CP 909; Sound Transit Resolution R2008-11.<sup>3</sup>

In 2016, voters approved a third tax package to fund ST3, which adds 62-miles to the light-rail system in Pierce, King and Snohomish Counties; extends commuter rail from Lakewood to DuPont; and adds bus rapid transit along State Route 522/523 from Shoreline to Woodinville, and along I-405 from Burien to Lynwood. CP 411. ST3 is the largest transit project in North America and is scheduled to open in stages from 2024 to

---

<sup>3</sup> Sound Transit, Resolution No. R2008-11, [https://www.soundtransit.org/st\\_sharepoint/download/sites/PRDA/FinalRecords/Resolution%20R2008-11.pdf](https://www.soundtransit.org/st_sharepoint/download/sites/PRDA/FinalRecords/Resolution%20R2008-11.pdf)

2041. *Id.* The ST3 tax package increased the MVET by 0.8%, which in addition to the previously approved 0.3% MVET results in a 1.1 % MVET. See CP 406.

ST3 involves significant projects in Pierce, King and Snohomish Counties. In Pierce County, Tacoma Link light rail is being extended from downtown to the Tacoma Community College. Six new stations are being built between the Hilltop Neighborhood and the college. CP 411-12. Light rail will be built from Federal Way to the Tacoma Dome. CP 412. ST3 also funds more daily commuter trains between Lakewood and Seattle and adds new stations at Tillicum and DuPont to serve passengers from Joint Base Lewis-McChord and south Pierce County. CP 412.

In King and Snohomish Counties, ST3 funds light rail to Ballard with five stations and to West Seattle with three stations. CP 413. Sound Transit will construct a four-station tunnel through downtown Seattle. *Id.* ST3 taxes will also fund a light-rail connecting Issaquah, Bellevue and South Kirkland; as well as Lynnwood and Everett. *Id.* CP 414. ST3 funds permanent bus rapid transit service along I-405 from Burien to Lynwood and along State Route 522/523 from Shoreline to Woodinville. CP 411.

In 2017, Sound Transit carried over 47 million riders: Link Light Rail carried 23.2 million riders; Sounder Commuter Rail carried 4.4 million riders; ST Express carried 18.4 million riders; and Tacoma Link Light Rail carried 1 million riders. CP 766.

#### **b. Sound Transit's MVET**

In 1992, the Legislature amended RCW 81.104.160 to authorize regional transit authorities to levy a voter-approved MVET on the value of vehicles as determined "under chapter 82.44 RCW." Laws of 1992, ch. 101, § 27. At that time, RCW 82.44.041 contained the vehicle depreciation schedule referenced in RCW 81.104.160. In 1996,

voters approved a 0.3% MVET to fund the *Sound Move Plan*. CP 406. From 1996 to the present, the schedule in the 1996 version of RCW 82.44.041 has been used to determine a vehicle's taxable value in calculating the Sound Transit MVET. *Id.*

In 2002, Initiative 776 ("I-776") repealed that portion of RCW 81.104.160 and other statutes necessary to impose a local MVET, including the vehicle depreciation schedule in RCW 82.44.041 used to calculate the tax. See Laws of 2003, ch. 1, § 5(6). In *Pierce County*, the Supreme Court held Const. art. I, § 23, which provides that no "law impairing the obligations of contracts shall ever be passed," prevents I-776 from repealing Sound Transit's authority to collect its MVET until the 30-year bond debt incurred in 1999 (the "1999 Bonds") and secured by the tax are paid off and retired. 159 Wn.2d at 27. The 1999 Bonds are not scheduled to be retired until 2028. See CP 406. Based on the Court's decision, Sound Transit continuously has collected the MVET using the 1996 depreciation schedule in RCW 82.44.041. *Id.*

In 2006, the Legislature authorized local governments to create regional transportation investment districts ("RTID") to build roads funded in part by a new MVET. Laws of 2006, ch. 318, § 1. To provide a vehicle depreciation schedule for the RTID MVET, the Legislature substantially readopted the old chapter 82.44 RCW that had been repealed by I-776 with one significant exception. The new law did not reenact the depreciation schedule formerly codified in RCW 82.044.041. Instead, the Legislature replaced RCW 82.044.041 with a new schedule, codified in RCW 82.44.035. The new schedule in RCW 82.044.035 lowers a vehicle's taxable value more rapidly than the old schedule in RCW 82.044.041. But because voters rejected the RTID ballot measure,

the new schedule in RCW 82.44.035 has never been applied to determine the value of any vehicle. CP 406, 419.

Although the depreciation schedule in RCW 82.44.035 provides that it applies to local MVETs, that schedule has never applied to Sound Transit's MVET because it would reduce the total MVET revenue Sound Transit collects by lowering the vehicle's taxable value to which the tax applied. Lowering the MVET revenue would have violated the agency's bond contract pledge not to reduce the MVET collected until the 1999 bonds are retired—a result prohibited by Const. art. I, § 23 and *Pierce County*, 159 Wn.2d at 51. Thus, Sound Transit continues to use the 1996 depreciation schedule from RCW 82.044.041 until the 1999 bonds are retired. CP 406. Accordingly, the 1996 depreciation schedule in RCW 82.44.041 continued to be the statutory depreciation schedule for the Sound Transit MVET even after the Legislature enacted RCW 82.44.035.

In 2010, the Legislature codified *Pierce County* as part of a technical amendments bill. Laws of 2010, ch. 161, § 903. The bill clarified that the Sound Transit MVET must use the depreciation schedule in RCW 82.44.041 (otherwise repealed by I-776) as required by *Pierce County*. The technical amendments bill added the following to RCW 81.104.160:

Any motor vehicle excise tax previously imposed under the provisions of RCW 81.104.160(1) shall be repealed, terminated, and expire on December 5, 2002, except for a motor vehicle excise tax for which revenues have been contractually pledged to repay a bonded debt issued before December 5, 2002, as determined by *Pierce County et al. v. State*, 159 Wn.2d 16, 148 P.3d 1002 (2006). In the case of bonds that were previously issued, the motor vehicle excise tax must comply with chapter 82.44 RCW as it existed on January 1, 1996.

CP 438-39. In a different section, the same bill amended the 2006 depreciation schedule at issue here. Laws of 2010, ch. 161, § 910. Neither amendment referenced the other. *Compare* CP 438-39 *with* CP 440-42.

In summary, notwithstanding both I-776's putative repeal of the 1996 depreciation schedule (RCW 82.44.041) in 2002, and the enactment of a new schedule (RCW 82.44.035) in 2006, the Sound Transit 0.3% MVET has always been calculated using the 1996 depreciation schedule. That result is required by *Pierce County*, which held the 1996 schedule was not repealed as to Sound Transit, and was codified by the Legislature in 2010.

**c. In 2015, the Legislature granted Sound Transit authority to seek voter approval of a new MVET with specified depreciation schedules.**

In 2015, the Legislature debated ESSB 5987, a bill to grant Sound Transit new taxing authority for a voter-approved MVET not to exceed 0.8%. See CP 526, 595. The new 0.8% MVET is in addition to the existing 0.3% MVET approved in 1996 and scheduled to be collected until 2028. As proposed, ESSB 5987 included a detailed provision specifying that different vehicle depreciation schedules would apply at different times. CP 595. The provision stated that for any new voter-approved MVET, the vehicle taxable value would be calculated using the 1996 depreciation schedule in the partially repealed RCW 82.44.041 until the 1999 Bonds are retired. *Id.* ESSB 5987 further provided that after the bonds are retired, the depreciation schedule used to determine a vehicle's taxable value changes from the 1996 schedule in RCW 82.44.041 to the schedule in effect in chapter 82.44 RCW in the year in which voters approve the new MVET. Specifically, ESSB 5987 set out in pertinent part:

Notwithstanding any other provision of this subsection or chapter 82.44 RCW, a motor vehicle excise tax imposed by a regional transit authority before or after the effective date of this section must comply with chapter 82.44 RCW as it existed on January 1, 1996, until December 31st of the year in which the regional transit authority repays bond debt to which a motor vehicle excise tax was pledged before the effective date of this section. Motor vehicle taxes collected by regional transit authorities after December 31st of the year in which a regional transit authority repays bond debt to which a motor vehicle excise tax was pledged before the effective date of this section must comply with chapter 82.44 RCW as it existed on the date the tax was approved by voters.

CP 595.

The Senate Transportation Committee bill report explained that “[t]he depreciation schedule remains the same as the MVET schedule in effect for the existing MVET until the bonds are repaid and then the schedule switches to the schedule that is in effect at the time the MVET is approved by the voters.” CP 652. Six other bill reports and a house bill analysis included identical summaries. CP 663, 675, 688, 698, 714, 722.

During the floor debate, Senator Ericksen expressed dissatisfaction with this approach and proposed Amendment 53 to make three changes: (1) repeal the existing depreciation schedule then codified in RCW 82.44.035, (2) enact a new depreciation schedule to replace the repealed RCW 82.44.035, and (3) eliminate Sound Transit’s authority to apply the 1996 depreciation schedule to the new 0.8% MVET. CP 745-47. Senator Lias spoke against the amendment explaining that because the existing 0.3% MVET must be calculated using the 1996 depreciation schedule until the bonds are repaid, “it didn’t make sense for the period of time that there are bonds overlapping for taxpayers to have two different values for their car based on the two different values that are in the statute . . . .” CP 749-50; see *also* CP 418. Senator Lias argued that the Legislature should “stick with the old table until the bonds are paid off and then switch to

the new improved and upgraded tables for ease of collection and to make it more simple for our taxpayers as they pay these taxes . . . .” CP 750. Amendment 53 failed a floor vote. *Id.* The Senate then passed ESSB 5987. CP 526.

At the House committee hearing, Representative Shea introduced Amendment H2685.1, which was substantially identical to Senator Ericksen’s Amendment. CP 752-54. The House Transportation Committee rejected the amendment. CP 756.

Thus, these two rejected amendments, one in the House and one in the Senate, would have repealed and replaced the existing depreciation schedule enacted in 2006 (RCW 82.44.035) and would have removed the requirement that the 1996 schedule apply to the new Sound Transit MVET authorized by the ESSB 5987. Both amendments further provided that any new MVET must use a different depreciation schedule proposed for the first time in the amendments. CP 745-47, 752-54.

Senator O’Ban held hearings before the Law and Justice Committee on the enactment of ESSB 5987 in which Counsel for the Code Reviser, Kyle Thiessen, was questioned. Although state law prohibited Mr. Thiessen from opining on the constitutionality of RCW 81.106.160(1), he testified that the Code Reviser had a practice of informing clients of the applicable constitutional and drafting standards, including the consequences for violating them.<sup>4</sup> He further testified that the name of the legislation at issue, “Second Engrossed Substitute Senate Bill” 5987, meant that RCW 81.106.160(1) “went through committee, two rounds of amendments on the floor, and so the entire Legislature had . . . many chances to look at the bill.”<sup>5</sup> When asked whether it

---

<sup>4</sup> Senate Law and Justice Committee, Work Session: Sound Transit Investigation (Sept. 26, 2017) at 20:29, <https://www.tvw.org/watch/?eventID=2017091061> (last accessed Feb. 19, 2019).

<sup>5</sup> *Id.* at 20:44.

was permissible for proposed legislation to reference an expired or repealed statute, Mr. Thiessen answered affirmatively by example, acknowledging reference to expired statutes has occurred in the criminal context for penalty enhancements.<sup>6</sup> The act was thoroughly vetted by the Legislature and the Code Reviser.

The bill reports, proposed amendments, and floor debate reveal that some legislators disliked the 1996 depreciation schedule, but agreed that it had to be used until the 1999 Bonds are retired. Other legislators disliked both the 1996 and 2006 depreciation schedules and wanted to repeal and replace them with an entirely new depreciation schedule, but lacked the votes for this approach.

Instead, the Legislature passed ESSB 5987, in which vehicle value is based on the 1996 depreciation schedule until the 1999 Bonds are retired, and then switches to the vehicle depreciation method specified by the version of chapter 82.44 RCW in effect the year voters approved the new MVET. See CP 526, 594-95. ESSB 5987 was codified at RCW 81.104.160(1).

**d. Voters approve the ST3 Plan and the proposed MVET.**

At least 20 days before the November 2016 election, every registered voter received a document describing the proposed ST3 projects, completion dates, cost, and taxes as required by RCW 81.112.030. CP 419, 758-65. The document explains that ST3 would be funded in part by a new 0.8% MVET, supplemented by revenue from the existing 0.3% MVET until that tax ends in 2028 when the 1999 Bonds are retired. CP 763. Voters approved the ST3 transit plan including the MVET. CP 406. As of June 30,

---

<sup>6</sup> See *id.* at 18:20 (stating that “we use those references even though it is a repealed crime”).

2018, Sound Transit had collected \$312,927,651 in revenue generated by the new 0.8% MVET. *Id.*

Between January 1, 2017 and August 13, 2018, Sound Transit has expended \$63 million and increased its workforce by 223 employees. *Id.* Based on 20 years' experience, Sound Transit forecasts that its contractors will employ nearly 29,000 construction workers and require approximately 43 million construction labor hours to implement ST3 generating approximately \$13.8 billion in wages and benefits. CP 770.

**e. Eliminating the MVET would delay critical transit projects and increase costs.**

The ST3 plan is substantially dependent on the approximately \$7 billion generated by the 0.8% MVET from 2017 to 2041. CP 406. The plan also requires borrowing at least \$11 billion secured by that revenue. *Id.* Losing the MVET revenue will have a drastic impact on Sound Transit's ability to build the voter-approved projects. CP 407. Without the MVET, the construction schedule must be substantially altered because the agency will not be able to borrow the funds necessary to replace the lost MVET funds. *Id.*

Sound Transit has modeled a potential delay. *Id.* The delay scenario attempts to deliver all ST3 projects within 25 years on the voter-approved schedule. *Id.* To do so, most light rail projects scheduled to open by 2035 would be delayed six years, and all projects opening after 2035 would open in 2041. *Id.*; see also table at CP 407-8. In addition, new operation and maintenance facilities and light rail vehicle purchases will be delayed. CP 407. There are also significant risks associated with labor and material costs. CP 772-77.

#### **f. Procedural History**

Black filed their Complaint alleging only one substantive claim: a declaratory judgment that RCW 81.104.160(1) violated art. II, § 37. CP 13. Black and Sound Transit filed cross-motions for summary judgment. The trial court heard oral argument, granted Sound Transit's motion and denied Black's motion. CP 1436-39. Black timely appealed. CP 1444-50.

Black spends a good number of pages mischaracterizing the oral argument and the Court's oral ruling as explained below. Given the standard of review here, such discussion is mainly irrelevant. Regardless, the trial court's core decision properly applied the appropriate test and the controlling case law and should be affirmed. RP 49.

### **III. COUNTERSTATEMENT OF ISSUES**

1. RCW 81.104.160(1) authorizes Sound Transit to submit for voter approval an additional MVET, and sets forth the maximum rate, the purposes for which it can be used, and the motor vehicle depreciation schedules to be used to calculate the tax. Is RCW 81.104.160(1) a complete act that fully sets forth all elements necessary to determine Sound Transit's MVET authority, thus satisfying the first prong of the art. II, § 37 test?

2. RCW 81.104.160(1) authorized Sound Transit to utilize the 1996 depreciation schedule for a new MVET until Sound Transit's 1999 Bonds are retired "[n]otwithstanding any other provision of ... chapter 82.44" RCW. Multiple Washington Supreme Court decisions confirm that an act using a "notwithstanding" clause complies with art. II, § 37. Does RCW 81.104.160's use of "notwithstanding" demonstrate that the Legislature was aware of and stated clearly its impact on existing laws, thus satisfying the second prong of the art. II, § 37 test?

3. The Washington Supreme Court held that I-776's repeal of the 1996 depreciation schedule used by Sound Transit for its initial MVET was not enforceable as to Sound Transit because it unconstitutionally impaired Sound Transit's bond contract. In 2010, the Legislature codified the Supreme Court's decision, and Sound Transit's ability to continue to use the 1996 depreciation schedule until Sound Transit's 1999 Bonds are retired. Does RCW 81.104.160(1)'s reference to, and adoption of, the 1996 schedule to calculate Sound Transit's new MVET until such time as the 1999 Bonds are retired render RCW 81.104.160(1) unconstitutional under art. II, § 37?

#### IV. ARGUMENT

##### a. Standard of Review

Like all statutes, RCW 81.104.160(1) is presumed constitutional. *See, e.g., In re A. W.*, 182 Wn.2d 689, 701, 344 P.3d 1186 (2015). A party challenging a statute's constitutionality bears a heavy burden to show the statute is unconstitutional beyond a reasonable doubt. *State v. Evergreen Freedom Found.*, -- Wn.2d --, 432 P.3d 805, 813 (Jan 10, 2019). Before a taxing statute is held unconstitutional under art. II, § 37, "it must be so clearly so that no other rational conclusion can be reached." *Gruen v. State Tax Comm'n*, 35 Wn.2d 1, 7, 211 P.2d 651 (1949) (internal quotations and citations omitted), *overruled on other grounds in part. by State ex rel. Wash. State Fin. Comm. v. Martin*, 62 Wn.2d 645, 384 P.2d 833 (1963). This requires the appellate court to be "fully convinced, after a searching legal analysis" that the statute violates the constitution. *Wash. Off Highway Vehicle All. v. State*, 176 Wn.2d 225, 234, 290 P.3d 954 (2012) (internal quotation marks and citations omitted). Black does not even discuss, let alone attempt to carry, their heavy burden of showing RCW 81.104.160(1) is unconstitutional beyond a reasonable doubt.

The trial court's grant of summary judgment on constitutionality is reviewed *de novo*, with the appellate court engaging in the same inquiry as the trial court. See *Evergreen Freedom Found.*, 432 P.3d at 809; *Lewis v. Boehm*, 89 Wn. App. 103, 106, 947 P.2d 1265 (1997). Regardless of the stated basis of the trial court court's ruling, this Court "may affirm on any ground supported by the record." *Wash. Fed. Sav. & Loan Ass'n v. Alsager*, 165 Wn. App. 10, 14, 266 P.3d 905 (2011) (citation omitted).

**b. RCW 81.104.160(1) does not violate art. II, § 37.**

**i. An act's compliance with art. II, § 37 is determined by applying a two-prong test.**

Article II, § 37 of the Washington Constitution states that "[n]o act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at length." The Supreme Court recently affirmed the rationale underlying art. II, § 37 and the two-prong test for determining whether legislation violates the clause. *El Centro De La Raza v. State*, 192 Wn. 2d 103, 128-29, 428 P.3d 1143 (2018). The Court first considered "whether the new enactment [is] such a complete act that the scope of the rights or duties created or affected by the legislative action can be determined without referring to any other statute or enactment." *Id.* at 129 (quoting *Manussier*, 129 Wn.2d at 663; *Wash. Educ. Ass'n v. State*, 97 Wn.2d 899, 903, 652 P.2d 1347 (1982)) (internal quotations omitted). In evaluating this question, the Court noted it important to consider the purpose of this part of the test: "to make sure the effect of new legislation is clear and to avoid[ ] confusion, ambiguity, and uncertainty in the statutory law through the existence of separate and disconnected legislative provisions, original and amendatory, scattered through different volumes or different portions of the same volume." *Id.* (quoting *Amalgamated Transit Union Local 587 v.*

*State*, 142 Wn.2d 183, 245, 11 P.3d 762 (2000); *Flanders v. Morris*, 88 Wn.2d 183, 189, 558 P.2d 769 (1977)) (internal quotations omitted).

This directive in *El Centro* is consistent with the Supreme Court's earlier pronouncements that art. II, § 37 "is designed to protect the Legislature from fraud and deception; not to trammel or hamper the Legislature in the enactment of laws." *Charles*, 148 Wn.2d at 631 (quoting *Spokane Grain & Fuel Co. v. Lyttaker*, 59 Wash. 76, 82, 109 P. 316 (1910), *overruled on other grounds by Wash. Fed'n of State Emps., AFL-CIO, Council 28, AFSCME v. State*, 101 Wn.2d 536, 682 P.2d 869 (1984)) (internal quotations omitted).<sup>7</sup>

In the second prong, the Court asks whether "a straightforward determination of the scope of rights or duties under the existing statutes [would] be rendered erroneous by the new enactment." *Manussier*, 129 Wn.2d at 663 (quoting *Wash. Educ. Ass'n*, 97 Wn.2d at 903). "If the answer is no, the legislation does not violate article II, section 37." *El Centro*, 192 Wn.2d at 129. The Court then stated the purpose of the second prong: "This prong of the test ensures that the Legislature is aware of the legislation's impact on existing laws." *Id.* (quoting *Amalgamated Transit Union*, 142 Wn.2d at 246).

Black essentially argues that any time legislation refers to or impacts another section of the RCW in some manner, it must be struck down unless it sets out each of those sections in full. But the Court in *El Centro* rejected this overly formalistic

---

<sup>7</sup> In *Spokane Grain*, the Supreme Court recognized that historically complete acts did not contravene the purpose behind art. II, § 37 or the provisions in other state constitutions after which it was modeled: "If the act is within itself complete and perfect, and is not amendatory and revisory in its character, it is not interdicted by this provision [art. II, § 37], although it amends by implication other legislation upon the same subject. Such an act, although it may operate to change or modify prior acts, is not within the mischief designed to be remedied by [art. II, § 37]." 59 Wash. at 80 (quoting *Warren v. Crosby*, 24 Or. 558, 561, 34 P. 661 (1893)); see also *People ex rel. Drake v. Mahaney*, 13 Mich. 481, 497 (1865) ("This constitutional provision must receive a reasonable construction, with a view to give it effect.... [A]n act complete in itself is not within the mischief designed to be remedied by this provision, and cannot be held to be prohibited by it without violating its plain intent.").

application of art. II, § 37, instead restating its prior holding that “while “[n]early every legislative act of a general nature changes or modifies some existing statute, either directly or by implication,” that does not necessarily mean that the legislation is unconstitutional.” *Id.* at 128 (quoting *Citizens for Responsible Wildlife Mgmt. v. State*, 149 Wn.2d 622, 640, 71 P.3d 644 (2003); *Holzman v. City of Spokane*, 91 Wash. 418, 426, 157 P. 1086 (1916)). It is therefore incorrect to argue that merely because RCW 81.104.160(1) establishes a specific depreciation schedule for Sound Transit’s MVET that is different from the schedule set in RCW 82.44.035, art. II, § 37 is violated. RCW 81.104.160(1) satisfies both prongs of the test reaffirmed in *El Centro*: it is a complete act, and it identifies any impact on existing laws.

**ii. RCW 81.104.160(1) is a complete act that satisfies the first prong of the art. II, § 37 test.**

A line-by-line analysis of RCW 81.104.160(1) demonstrates that it satisfies the first prong of the test, which asks if the new law is a complete act because all the elements necessary to be fully informed about the rights created or affected by RCW 81.04.160(1) can be learned from reading the bill. RCW 81.104.160(1) sets forth the process for adopting the new MVET. The act provides that regional transit authorities in counties of a certain size may seek voter approval to impose the MVET authorized by the law. *Id.* RCW 81.104.160(1) sets forth the maximum tax rate that voters can approve: 0.8%. RCW 81.104.160(1) also sets forth the limited purpose for which the MVET can be used: “providing high capacity transportation service”. Finally, RCW 81.104.160(1) sets forth the depreciation schedule to be used: “Notwithstanding any other provision of this subsection or chapter 82.44 RCW, a motor vehicle excise tax imposed by a regional transit authority before or after July 15, 2015, must comply with

chapter 82.44 RCW as it existed on January 1, 1996, until December 31st of the year in which the regional transit authority repays bond debt to which a motor vehicle excise tax was pledged before July 15, 2015.” The act continues: “Motor vehicle taxes collected by regional transit authorities after December 31st of the year in which a regional transit authority repays bond debt to which a motor vehicle excise tax was pledged before July 15, 2015, must comply with chapter 82.44 RCW as it existed on the date the tax was approved by voters.” RCW 81.104.160(1).

The Legislature thus straightforwardly adopted two depreciation schedules. Pursuant to the decision in *Pierce County*, the 1996 schedule applies until Sound Transit pays off the 1999 Bonds, at which time authority to collect the 0.3% MVET ends. The Legislature’s decision to use the 1996 schedule for any new MVET until the 1999 Bonds are paid off ensures that the same vehicle depreciation schedule is used for the period of time in which the 0.3% MVET and a new voter-approved MVET are both assessed. At the time the 1999 Bonds are paid off, and the 0.3% MVET is no longer collected, the MVET depreciation schedule in effect when the new MVET was authorized will be used.<sup>8</sup> All information needed to impose the tax—purpose, use, rate, and method of calculation before and after December 31, 2028—can be determined solely by reading RCW 81.104.160(1). See *El Centro*, 192 Wn.2d at 129 (citing *Citizens for Responsible Wildlife Mgmt.*, 149 Wn.2d at 642). In fact, the Supreme Court held previously that former RCW 81.104.160 contained the necessary information, processes, and protections required to be a valid delegation of taxing authority to Sound Transit. *Sheehan v. Central Puget Sound Regional Transit Authority*, 155 Wn.2d 790,

---

<sup>8</sup> The timing of voter approval was not knowable at the time the Legislature passed RCW 81.104.160(1). As it happens, the depreciation schedule adopted in 2006 was the schedule otherwise in effect at the time of voter approval and thus will apply after the bonds are paid off.

799, 123 P.3d 88 (2005). The 2015 version of RCW 81.104.160(1), at issue here, contains the same information, processes and protections. It is a complete act in all respects.

In addition to the plain statutory language, the legislative history confirms that the Legislature fully understood the new law's operation. For example, the original and all subsequent bill reports provided: "The depreciation schedule remains the same as the MVET schedule in effect for the existing MVET until the bonds are repaid and then the schedule switches to the schedule that is in effect at the time the MVET is approved by the voters." CP 652; see *also* CP 655-743. Indeed, before enacting RCW 81.104.160(1), the House and Senate debated and rejected amendments to repeal and replace the depreciation schedule referenced in RCW 81.104.160(1) with an entirely new schedule, which would have more quickly depreciated vehicle values. CP 744-47, 751-54. The proposed amendments to repeal and replace both versions of the depreciation schedule—the 1996 version and the version codified at RCW 82.44.035—demonstrate that the legislators were entirely aware of RCW 81.104.160(1)'s impact on RCW 82.44.035. See *id.*; CP 748-50, 755-56. Thus, the concerns regarding legislator deception underlying art. II, § 37 are not implicated by RCW 81.104.160(1).

**iii. The Supreme Court has repeatedly upheld the use of a notwithstanding clause as a valid means to comply with art. II, § 37.**

Because RCW 81.104.160(1) is a complete act,<sup>9</sup> the focus of the second prong of the art. II, § 37 test turns on whether "the Legislature [was] aware of the legislation's impact on existing laws." *El Centro*, 192 Wn.2d at 128-29 (quoting *Amalgamated Transit*

---

<sup>9</sup> It is exceedingly rare for a complete act to contravene the second prong of the art. II, § 37 test. In fact, it appears *El Centro* is the only case to so hold (and Black has not cited any others).

*Union*, 142 Wn.2d at 246). Here, the Legislature used a term of art—“notwithstanding”—that has been approved by the Supreme Court multiple times as an appropriate way to show that the Legislature understood RCW 81.104.160(1)’s impact on RCW 82.44 and complied with art. II, § 37.

Three Supreme Court cases are directly on point: *Charles*, 148 Wn.2d at 631; *Manussier*, 129 Wn.2d at 664; and *Thorne*, 129 Wn.2d at 753. In each case, the new statute superseded or temporarily suspended provisions in another statute through use of a “notwithstanding” clause. And in each case, the Supreme Court held that the act at issue did not violate art. II, § 37 despite the act’s impact on another existing statute.

*Throne* and *Manussier* involved Initiative 593, which mandated a new life imprisonment sentence for persons convicted of certain crimes, a significantly greater penalty than proscribed by other statutes for the same crimes. Initiative 593 did not include the full text of the other criminal statutes it implicitly amended by establishing a new and significantly different maximum sentence than stated in existing statutes. A person reading the original criminal sentencing statutes would not see any reference to confinement for life. Instead of reprinting the full text of the affected statutes, Initiative 593 provided: “A persistent offender shall be sentenced to a term of total confinement for life . . . **notwithstanding the maximum sentence under any other law.**” *Manussier*, 129 Wn.2d at 665 n.39 (emphasis in original).

Faced with an art. II, § 37 challenge, the Supreme Court held “Initiative 593 is a complete act. Its purpose was not hidden, and its modification of other sentencing laws is readily apparent from a reading of its provisions.” *Id.* at 665. In *Thorne*, the Court in further examining Initiative 593 noted the law’s effect “to restrict the effect of the

maximum penalty statute, is obvious from the language which states that a life sentence is to be imposed on persistent offenders ‘notwithstanding the maximum sentence under any other law.’” 129 Wn.2d at 756 (citation omitted). In both cases, the Court found a complete act because, *inter alia*, the “notwithstanding” language made clear that the life sentences imposed under RCW 9.94A.120(4) would be different than the lesser sentences imposed under other statutes.

Similarly, the statute in *Charles* changed statutory pension contribution rates and suspended the notice provisions in another statute through a “notwithstanding” clause: “The May 1, 2000, contribution rate changes provided in this section shall be implemented **notwithstanding** the thirty-day advanced notice provisions of RCW 41.26.450 and 41.40.650.” Laws of 2000, 2d Spec. Sess., ch. 1, § 906(7) (EHB 2487) (emphasis added). The Court rejected an art. II, § 37 challenge to this language stating: “Retirees and Employees contend that section 906(7) suspends the statutes providing a 30–day notice of contribution changes without setting forth the previous sections, former RCW 41.26.450 (1996) and former RCW 41.40.650 (1989), in full. This suspension, however, does not aim to confuse legislators or interested citizens. The statutory provisions are clearly referenced in section 906(7).” *Charles*, 148 Wn.2d at 633-34.

In all three cases, the act at issue used the structure of a “notwithstanding” clause to impliedly amend or suspend portions of existing statutes without reprinting them in full. The Supreme Court held that the acts nevertheless fully explained the law enacted and disclosed its impact on existing law such that no one would be confused or misled. Article II, § 37 was held not violated.

RCW 81.104.160(1) uses the same structure, stating that the 1996 depreciation schedule applies “**notwithstanding any other provision of this subsection or chapter 82.44 RCW . . .**” (emphasis added). Like Initiative 593 and the statute in *Charles*, RCW 81.104.160(1) does not amend chapter 82.44 RCW in violation of Art. II §37. Rather, the notwithstanding language indicates that chapter 82.44 RCW is suspended as it applied to Sound Transit’s MVET until the 1999 Bonds are paid off and retired. That is exactly the use of a “notwithstanding” clause approved in *Charles*. Like Initiative 593 and the act in *Charles*, RCW 81.104.160(1) is a complete act. Its purpose and effect on existing law was not hidden. And its impact upon chapter 82.44 RCW is explicitly stated and readily apparent from a reading of its provisions.

RCW 81.104.160(1) satisfies the second prong of the art. II, § 37 test for a second independent reason. Chapter 82.44 RCW does not independently grant any rights to establish an MVET. MVET authority and rights are always granted through independent legislation. Chapter 82.44 RCW sets forth a depreciation schedule and the administrative process for paying the tax to the State Department of Licensing. Thus, chapter 82.44 RCW alone does not grant “rights or duties” that can be “rendered erroneous” by adoption of RCW 81.104.160(1) or any statute otherwise granting MVET authority.

*El Centro* does not dictate a different result. First, as noted above, *El Centro* cited *Manussier* with approval. Black cannot argue that anything in *El Centro* overruled *Manussier*, *Thorne*, or *Charles*. Second, the Charter Act at issue in *El Centro* did not use “notwithstanding” or any other language to clarify the Act’s effect on other statutes. Therefore, the Charter Act violated prong two of the art. II, § 37 test because the

Charter Act restricted rights granted in another statute without “explicitly show[ing] how [the Act] relates to the statutes it amends.” *El Centro*, 192 Wn.2d at 132. The problem was that the Act failed to show how it related to RCW 41.56.060 (e.g., by use of a “notwithstanding” clause to clearly explain its effect on RCW 41.56.060). Third, unlike chapter 82.44 RCW, RCW 41.56.060 itself grants independent collective bargaining rights and the authority to identify bargaining units. One reading RCW 41.56.060 alone would believe that certain charter school employees were covered by that statute. The rights granted there are restricted by the Charter Act without a reference that would inform charter school employees that the Act restricts those rights. In contrast, one reading chapter 82.44 RCW alone would neither know that the Sound Transit MVET exists nor learn any substantive information about the tax, and therefore could not be misled or confused.

In sum, RCW 81.104.160(1) satisfies both the letter and purpose of art. II, § 37, and meets both prongs of the Supreme Court’s test most recently reaffirmed in *El Centro*.

**iv. No cases support Black’s argument that reference to the 1996 depreciation schedule renders RCW 81.104.160(1) incomplete.**

Black does not argue that a statute violates art. II, § 37 simply because it incorporates some element of another statute. Nor could that be argued because the Supreme Court has long held otherwise: “It is generally recognized that certain types of enactments, designated by the courts as ‘reference statutes,’ are not within the restrictions contemplated by art. II, § 37 of the constitution.” *State ex rel. Wash. Toll Bridge Auth. v. Yelle*, 32 Wn.2d 13, 28, 200 P.2d 467 (1948) (citations omitted). Rather,

Black argues that the 1996 depreciation schedule is a fully repealed statute, which cannot qualify as the subject of a reference statute. Neither premise is correct.

First, Black cites no case law either holding that only existing Washington statutes can be incorporated into valid reference statutes or precluding a repealed statute from being referenced in a valid reference statute. “Reference statutes are those statutes which refer to, and by reference adopt wholly or partially, pre-existing statutes, or which refer to other statutes and make them applicable to an existing subject of legislation.” *Id.* Reference statutes “are frequently used to avoid encumbering the statute books by unnecessary repetition, and they are recognized in this state as an approved method of legislation.” *Knowles v. Holly*, 82 Wn.2d 694, 700, 513 P.2d 18 (1973). The fundamental attribute of a reference statute is that the Legislature chooses to incorporate some existing point of reference as part of the implementation of a new law.

The Supreme Court has recognized that a Washington statute that incorporated a federal statutory definition was an appropriate reference statute. *TracFone Wireless, Inc. v. Wash. Dep’t of Revenue*, 170 Wn.2d 273, 284, 242 P.3d 810 (2010) (“Former RCW 82.14B.020(9) was a reference statute, in that it adopted by reference part of [the federal Mobile Telecommunications Sourcing Act].”). Other statutes routinely reference points of information or definitions found outside of existing Washington statutes. See, e.g., RCW 53.12.260(4) (referring to consumer price index); RCW 43.155.060(2) (setting interest rates based on interest rate for tax-exempt municipal bonds); RCW 19.27.031 (adopting by reference the building and fire codes published by the International Code Council as the state building and fire codes). None of these

referenced schedules are codified in the RCW, even though the information in them regularly changes. Neither case law nor logic precludes referencing legislatively sanctioned external sources to incorporate information not printed in existing Washington statutes.

Second, Black seeks to avoid this conclusion by mischaracterizing both the Legislature's intent in using the 1996 depreciation schedule and the status of the 1996 depreciation schedule as applied to Sound Transit. The Legislature was not reenacting the 1996 depreciation schedule to the extent it was effectively repealed by I-776. Rather, the Legislature was simply using the then existing (in 2015) and currently used (e.g., in 2019) depreciation schedule that Sound Transit has used since 1999, when it pledged to collect the MVET to secure payment of the 1999 Bonds. That schedule will continue to be used until 2028, when the bonds will be paid off and retired.

Significantly, Black admits that the "Washington Supreme Court . . . held the repeal of the MVET was unconstitutional" as applied to Sound Transit, but does not explain why this Court should treat the 1996 depreciation schedule as though it was completely repealed and thus had to be reenacted. That schedule was not repealed as to Sound Transit and did not have to be reenacted to continue to apply to Sound Transit's MVET. Moreover, Black completely ignores the technical amendment the Legislature made in 2010 to enact RCW 81.104.160(3) and to acknowledge and codify the Supreme Court's holding that Sound Transit is legally required to continue to use the 1996 depreciation schedule until the 1999 Bonds are retired. Black's reenacting a repealed statute scenario is a mischaracterization of the facts.

Regardless of whether RCW 82.44.041 was repealed, a reference statute can effectively reference a repealed statute without running afoul of art. II, § 37. In *Rosell v. Department of Social and Health Services*, the Court analyzed the effect of the repeal of a statute referenced in a newly enacted statute. 33 Wn. App. 153, 156-60, 652 P.2d 1360 (1982). The Court appropriately addressed the issue as one of determining legislative intent. It found that the Legislature intended to reference the terms of the subsequently repealed statute that existed at the time the new statute was enacted. The subsequent repeal did not alter the Legislature's original intent. The point of *Rosell* is to focus on legislative intent, which is clear here: apply the 1996 depreciation schedule until the 1999 Bonds are paid off. The partial repeal of the 1996 depreciation schedule is a red-herring.

*State v. Sam* does not support Black's argument that the Legislature may not reference a repealed statute in a newly enacted statute. 85 Wn.2d 713, 538 P. 2d 1209 (1975). *Sam* holds that when the legislative history demonstrates that the Legislature mistakenly included repealed statutory language in a new statute "through oversight or inadvertence," it did not intend to reenact the repealed law. *Id.* at 718. Under the analysis in *Sam*, the converse is also true: if the statute's plain language or legislative history demonstrates that the Legislature intended to incorporate and give effect to language from a repealed statute, the Court will interpret the new statute accordingly. Indeed, *Sam* supports Sound Transit's position. Unlike in *Sam*, there is no argument that the Legislature is trying to revive that part of the 1996 depreciation schedule that was held by the Supreme Court to be repealed, i.e., the schedules that applied to all MVETs other than the one adopted by Sound Transit. All parties here agree that the

Legislature intentionally referenced part of chapter 82.44 RCW as it existed in 1996 in order to incorporate the 1996 depreciation schedule into RCW 81.104.160(1) as required by the Supreme Court's decision in *Pierce County*. That decision established that even though I-776 repealed local MVET authority under RCW 81.104.160(1), the repeal was unenforceable as to Sound Transit, which retained its statutory authority under RCW 81.104.160(1) and its ability to use the 1996 depreciation schedule referenced therein (RCW 82.44.041) until the 1999 Bonds are retired. *Pierce County*, 159 Wn.2d at 51.

Moreover, in *Sam*, the Court noted additional evidence of the Legislature's intent that further distinguishes it from the present case. Specifically, the Court noted that the Legislature failed to adopt a technical amendment to remove that part of the old statute repealed by the Supreme Court. 85 Wn.2d at 717-18. That failure demonstrated such inattention to its obligation to accurately update the RCWs that the Court could not infer a conscious legislative intent to reenact a law declared unconstitutional many years earlier. But here the Legislature did act to ensure that the RCWs were updated to accurately reflect the law by passing a technical amendment in 2010 (SB 6379) reflecting the Supreme Court's decision in *Pierce County* and authorizing Sound Transit to continue to use the 1996 depreciation schedule. Laws of 2010, ch. 161, § 903. Unlike in *Sam*, the Legislature intended to reference and adopt the 1996 depreciation schedule for the reasons stated by legislators when debating the bill.

Similarly, *Local No. 497 v. Public Utility District No. 2 of Grant County* does not support Black's argument. 103 Wn.2d 786, 698 P.2d 1056 (1985). *Local No. 497* addressed how to discern whether the Legislature intended to repeal a statute by

implication where an older statute conflicts with a newer statute and the Legislature did not state its intent. That is not the case here. The Legislature was clear that it intended in RCW 81.104.160(1) to authorize use of the 1996 depreciation schedule “notwithstanding any provision of . . . RCW 82.44” including the 2006 depreciation schedule. Fundamentally, *Local No. 497*, like *Rosell* and *Sam*, relies on determining legislative intent in resolving the question before the Court. Here, the Legislature stated its intent plainly and explicitly.

Black’s reference to statements made at the trial court oral argument mischaracterize Sound Transit’s position and ignore the argument Black made below. Black’s argument conflated two independent issues: whether a complete act can reference a repealed statute (yes), and whether a complete act may implicitly or incidentally amend an existing law if the new act explains its effect on the existing law (yes). Regarding the first issue, RCW 81.104.160(1) is a reference statute because it refers to the 1996 depreciation schedule. As set forth above, there is nothing wrong with the Legislature referencing any point of information, be it an existing or partially repealed Washington statute, a federal statute, or an external fact such as the international building code. As Sound Transit’s counsel argued below: “All of the cases talking about reference statutes are cases in which the claim was, because you include a reference statute that violates art. II, § 37. And the case law says reference statutes are fine and you do not have to spell them out.” RP 38. This statement simply confirms the ability of the Legislature to refer to the 1996 depreciation schedule.

But Black also argued there is a second aspect to the art. II, § 37 issue: whether the Legislature is being clear about the relationship between a new statute (RCW

81.104.160(1)) and an existing statute (the 2006 version of chapter 84.22 RCW). As discussed above, the Supreme Court on multiple occasions has affirmed that using the term of art “notwithstanding” is sufficient and appropriate for the Legislature to make clear that an existing statute does not apply to the particular circumstances specified in a new statute. Counsel for Sound Transit was simply making the point that as to this argument, the *Manussier*, *Thorne*, and *Charles* line of cases controls the conclusion that art. II, § 37 was not violated.<sup>10</sup> The reference statute cases are not relevant to that point.

That RCW 81.104.160(1) uses a notwithstanding clause as to the 2006 version of chapter 84.22 RCW, however, does not render improper its separate reference to the 1996 depreciation schedule. Black’s attempt to amalgamate these two distinct concepts by incorrectly asserting that an act cannot be complete if it refers to a repealed statute and also implicitly or incidentally amends an existing law should be rejected. A complete act can reference a repealed statute. And that same complete act complies with art. II, § 37 if it explains its effect on existing law with a “notwithstanding” clause. See, *Charles*, 148 Wn.2d at 631; *Manussier*, 129 Wn.2d at 664; *Thorne*, 129 Wn.2d at 753.

**v. The cases Black cite do not support their argument that RCW 81.104.160(1) fails the second prong of the art. II, § 37 test.**

Black’s discussion of *Flanders v. Morris* inexplicably ignores the Court’s core reasoning in that case. 88 Wn.2d 183, 558 P.2d 769 (1977). The Court found three issues that resulted in an art. II, § 37 problem, none of which are present here. First, the enactment at issue in *Flanders* was an appropriations bill, which cannot constitutionally

---

<sup>10</sup> Black argues without citation that because RCW 81.104.160(1) adopts the depreciation schedule in effect on a future date (the date the new Sound Transit MVET is approved), it is not a complete act. Black’s argument ignores that “[t]he power to enact contingent legislation has clearly been recognized.” *Brower v. State*, 137 Wn. 2d 44, 55, 969 P.2d 42 (1998). If Black were right, all contingent legislation would violate art. II, § 37, which is clearly not the case.

enact substantive law. An appropriations bill that cannot enact substantive law is not an appropriate means to amend an existing substantive law. Second, an appropriations bill is never codified. Thus, after enactment there is no way to look at the RCW to learn that the Legislature amended an existing statute. Third, the appropriations bill did not even contain language that gave notice that its effect was to amend an existing statute. Unlike the appropriations bill in *Flanders*, RCW 81.104.160(1) was lawfully enacted substantive legislation. After adoption, ESSB 5987 was codified at RCW 81.104.160(1) so its impact on existing law could be seen by a review of the RCW. And by using a notwithstanding clause, RCW 81.104.160(1) gave notice that chapter 82.44 RCW was being suspended in part. Finally, *Flanders* is inapplicable because the statute being amended by the appropriations bill actually granted substantive rights qualifying one for public assistance. Chapter 82.44 RCW grants no substantive rights. Rather, RCW 81.104.160(1) grants the only substantive rights at issue and fully explains its relation to the depreciation schedule in RCW 82.44.

*Washington Education Association v. State* likewise does not support Black's argument. 93 Wn.2d 37, 604 P.2d 950 (1980) ("*WEA*"). There, the challenged bill imposed a limitation that "merely provide[d] that no [school] district may grant a salary increase greater than a certain amount." *Id.* at 40. The act was incomplete because it did "not specify what powers remain with the district or whether the district has the power to grant salary increases at all." *Id.* The Court held that "[i]n order to understand the effect of the limitation, one must refer to RCW 28A.58.010 and .100(1) which establish the general powers of the district and the powers of the school board to fix salaries of employees." *Id.* at 40-41. In contrast to the language in *WEA*, which failed to

set forth in one statute a school district's general power to fix salaries, RCW 81.104.160(1) is a complete law that sets forth all the authority vested in regional transit authorities to levy the MVET, i.e., with voter approval, in an amount not to exceed 0.8%, on motor vehicles within the taxing district, and using the 1996 depreciation schedule until bond repayment and then switching to the version of chapter 82.44 RCW in effect when voters approve the new MVET. There is no need to look to chapter 82.44 RCW to understand the substantive law regarding the Sound Transit MVET—the entire law is set forth in one statute, RCW 81.104.160(1). And RCW 81.104.160(1) makes its effect on chapter 82.44 RCW clear through its use of the “notwithstanding” clause explaining when that chapter applies.

**vi. Legislative history is relevant to determine compliance with art. II, § 37.**

Finally, Black's argument that this Court should ignore the legislative history documenting the proposed amendments and debate before the enactment of RCW 81.104.160(1) makes no sense and is contrary to a long line of art. II, §37 cases. Courts routinely looked to extrinsic evidence including other statutes and legislative history to determine whether an act violates art. II, § 37. *See, e.g., Flanders*, 88 Wn.2d at 184-86; *WEA*, 93 Wn.2d at 40. For example, in *Flanders*, the Court examined legislative history to conclude there was unlawful deception. 88 Wn.2d at 186. And in *WEA I*, the Court noted that “[a] staff counsel of the Senate Research Center advised the appropriate Senate committee chairman that the bill limitation was unconstitutional as violative of, among other things, article 2, section 37.” 93 Wn.2d at 40. The Court considered that “background” important in evaluating whether it should strike down a legislative enactment or defer to legislative judgment. *See id.* The purpose of referring to

legislative history is not, as Black argues, to ascertain a legislator's subjective intent. Nor is the purpose to cure an art. II, § 37 violation. The purpose is to ascertain the objective legislative record. That objective record provides a basis for evaluating whether the policies behind art. II, § 37 are implicated, and for assessing whether the Court is justified in declaring legislation unconstitutional beyond a reasonable doubt. See *Citizens for Responsible Wildlife Mgmt.*, 149 Wn.2d at 631 (applying beyond a reasonable doubt standard to claims including art. II, § 37). Here, the legislature history further demonstrates that the Legislature fully understood RCW 81.104.160(1)'s effect on chapter 82.44 RCW.

## V. CONCLUSION

RCW 81.104.160(1) is a complete act that sets forth all the elements of Sound Transit's MVET. It is structured consistently with an established line of Washington Supreme Court cases that have approved using a "notwithstanding" clause to identify a newly enacted statute's relationship with an earlier enacted statute. *Thorne*, 129 Wn.2d at 756; *Charles*, 148 Wn.2d at 633-34; *Manussier*, 129 Wn.2d at 664. These cases held that statutes with "notwithstanding" clauses language virtually identical to RCW 81.104.160(1) did not violate art. II, § 37. RCW 81.104.160(1) satisfies the two prong test under art. II, § 37. And RCW 81.104.160(1) does not violate any of the policies underlying art. II, § 37.

Moreover, the language in RCW 81.104.160(1) is consistent with the Supreme Court's decision in *Pierce County*, which held that the authority granted by RCW 81.104.160(1), including its adoption of the 1996 depreciation schedule, was not repealed as to Sound Transit. 159 Wn.2d at 51. Sound Transit retained its statutory

authority to impose the MVET and use the 1996 schedule until the 1999 Bonds are paid off and retired. RCW 81.104.160(1) is also consistent with 2010 legislation that codified the *Pierce County* decision. Laws of 2010, ch. 161, § 903. It does not reenact repealed law.

The trial court correctly ruled that Black failed to prove that RCW 81.104.160(1) is unconstitutional beyond a reasonable doubt and that RCW 81.104.160(1) does not violate art. II, § 37. Its decision granting Sound Transit's motion for summary judgment should be affirmed.

DATED this 19<sup>th</sup> day of February, 2019.

PACIFICA LAW GROUP LLP

CENTRAL PUGET SOUND REGIONAL  
TRANSIT AUTHORITY

By: s/ Paul J. Lawrence  
Paul J. Lawrence, WSBA #13557  
Matthew J. Segal, WSBA #29797  
Athanasios P. Papailiou, WSBA #47591

By: s/ Desmond L. Brown  
Desmond L. Brown, WSBA #16232  
Mattelyn L. Tharpe, WSBA #53743  
Natalie A. Moore, WSBA #45333

*Respondent*

*Respondent*

# PACIFICA LAW GROUP

February 19, 2019 - 4:52 PM

## Transmittal Information

**Filed with Court:** Court of Appeals Division II  
**Appellate Court Case Number:** 52664-6  
**Appellate Court Case Title:** Taylor Black et al, Appellants v. Central Puget Sound Regional Transit Authority, Respondent  
**Superior Court Case Number:** 18-2-08733-9

### The following documents have been uploaded:

- 526646\_Briefs\_20190219164610D2249893\_8566.pdf  
This File Contains:  
Briefs - Respondents  
*The Original File Name was ST Black Brief.pdf*

### A copy of the uploaded files will be sent to:

- DionneP@atg.wa.gov
- Jessica.skelton@pacificalawgroup.com
- david@albrechtlawfirm.com
- desmond.brown@soundtransit.org
- joel@ard.law
- lalseaef@atg.wa.gov
- matt@albrechtlawfirm.com
- mevans@trialappeallaw.com
- paul.lawrence@pacificalawgroup.com

### Comments:

---

Sender Name: Sydney Henderson - Email: sydney.henderson@pacificalawgroup.com

**Filing on Behalf of:** Matthew J Segal - Email: matthew.segal@pacificalawgroup.com (Alternate Email: dawn.taylor@pacificalawgroup.com)

Address:  
1191 Second Avenue, Suite 2100  
Seattle, WA, 98101  
Phone: (206) 245-1700

**Note: The Filing Id is 20190219164610D2249893**