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No. 92846-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

ALYNE FORTGANG,

Petitioner/Plaintiff,

v.

WOODLAND PARK ZOO a/k/a WOODLAND PARK ZOOLOGICAL

SOCIETY,

Respondent/Defendant.

**BRIEF OF *AMICUS CURIAE* OF THE WASHINGTON
COALITION OF OPEN GOVERNMENT IN SUPPORT OF
PETITION FOR REVIEW**

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I. IDENTITY AND INTEREST OF AMICUS

The Washington Coalition for Open Government (“WCOG” or “*Amicus*”) is an independent, nonpartisan organization dedicated to promoting and defending the public’s right to know about the conduct of public business and matters of public interest. WCOG represents the interests of individuals and organizations concerned with preserving and protecting Washington’s laws promoting transparent and open government, including the Public Records Act (“PRA”). Its members are frequent users of the PRA, on which they rely to inform the public and keep the government accountable to the governed. WCOG’s mission is to foster the cornerstone of democracy: open government, supervised by an engaged and informed citizenry. To that end, WCOG conducts public workshops and forums around the state, involving the public, public officials, and the media in discussing government accessibility.

Amicus has reviewed the documents and pleadings in this case and are familiar with the issues and arguments raised by the parties.

II. ARGUMENT IN SUPPORT OF GRANTING REVIEW

WCOG supports the Petition for Review filed by Petitioner Alyne Fortgang, which seeks review of the decision of the Division I Court of Appeals styled *Woodland Park Zoo v. Alyne Fortgang*, 192 Wash.App. 48, Case No. 72413-4-I (Feb. 1, 2016, as corrected Feb. 3, 2016). The

Petition for Review presents issues that are of substantial importance to the public and to WCOG constituents.

The parties made fact-specific arguments below on whether the Zoo is or is not subject to the PRA under *Telford v Thurston County Board of Commissioners*, 95 Wn. App.149, 974 P.2d 886 (1999) (“*Telford*”), reviewed denied, 138 Wn.2d 1015 (1999). In *Telford*, the Div. II Court of Appeals set forth a four-part balancing test to assess whether a private entity is a “functional equivalent” of a government agency. *Id.* at 162. WCOG filed an *amicus* brief below specifically addressing the “level of government funding” prong of the four-part *Telford* test.

Applying the *Telford* test, the Division I Court of Appeals held that the respondent Woodland Park Zoological Society (the “Zoo”) is not the functional equivalent of a government agency subject to the PRA. With regard to the “level of government funding” prong, the Court of Appeals gave little consideration to the fact that the Zoo’s government funding was possible through a voter-approved parks levy. Instead, the Court of Appeals focused on whether the Zoo’s receipt of public funds constituted a majority of its revenue.

A. Funding through a Parks Levy is a Significant Factor in Evaluating the “Level of Government Funding” prong of the *Telford* Test.

Amicus believes it is significant that the Zoo receives millions of dollars in funding directly from a voter-approved park levy that specifically named the Zoo as a beneficiary. Receipt of direct funds

through a taxpayer levy weighs in favor of finding that the private entity is the “functional equivalent” of a government agency subject to the PRA.

In November 2000, while the City was operating the zoo, the City placed the Neighborhood Parks, Green Spaces, Trails and Zoo levy lid lift on the ballot. It was approved by the voters. (CP 34.)

The Zoo continues to receive taxpayer funds directly through a parks levy. In the August 2013 Primary and Special Election, King County voters approved Proposition No. 1, the Parks, Trails, and Open Space Replacement Levy.¹ The ballot language stated:²

King County
Proposition No. 1

Levy for parks, trails, and open space
The King County council has passed Ordinance 17568 concerning funding for parks, trails, recreational facilities and open space. This proposition would replace two expiring levies and fund maintenance and operations of the King County parks system; trails and open space for recreation, habitat and water quality; city parks; and zoo programs, all subject to citizen oversight. This proposition authorizes an additional property tax of \$0.1877 per \$1,000 of assessed value for collection in 2014 and authorizes increases by the annual percentage change in the CPI or the limitation

¹ See *Parks, Trails and Open Space Replacement Levy*, King County Parks, available at <http://www.kingcounty.gov/services/parks-recreation/parks/about/levy.aspx> (accessed on April 25, 2016).

² See *Proposition No. 1 Parks Levy Measure Info*, King County Elections, available at <http://your.kingcounty.gov/elections2/contests/measureinfo.aspx?cid=46026&eid=1256> (accessed on April 25, 2016).

in 84.55 RCW, whichever is greater, for five succeeding years. Should this proposition be:

Approved

Rejected

The reference to “citizen oversight” is referring to the Parks Levy Citizen Oversight Board, established by the levy legislation in 2008.³ Presumably, when voters approved of the parks levy, they understood that the Zoo would receive some of the levy funds and be subject to a level of “citizen oversight” like other governmental agencies receiving levy funds.

A May 2013 voter information brochure styled “Frequently Asked Questions” stated:

What would the Woodland Park Zoo receive from this levy?

An estimated \$4.2 million per year would support the Zoo, a continuation of the level provided under the current 2008-2013 Open Space and Trails Levy. Levy proceeds for the Zoo are designated for environmental education programs, with emphasis on accessibility for traditionally underserved populations in the county; horticulture and maintenance of buildings and grounds; conservation and animal care for rare, threatened or endangered Pacific Northwest species; and for board-approved capital projects/campaigns in existence as of December 31, 2012. In 2012, proceeds from the 2008-2013 Open Space and Trails Levy accounted for approximately 12 percent of the Zoo’s total operating revenues.⁴

³ See footnote 1.

⁴ See *King County Parks, Trails, and Open Spaces Replacement Levy, Frequently Asked Questions*, King County Parks, available at http://your.kingcounty.gov/dnrp/library/parks-and-recreation/documents/about/Parks%20Levy%20FAQ_FINAL.pdf (accessed April 25, 2016).

The levy ordinance authorizing the levy proposition to be on the August 2013 ballot identifies how the property tax levy funds would be used, including “funding environmental education, maintenance, conservation and capital programs at the Woodland Park Zoo.”⁵ Thus, the Zoo’s use of the levy funds, practically speaking, do not appear to be restricted.

The Zoo is not required to provide specific services in exchange for receiving the parks levy funds. Under the reasoning of *Telford*, allowing the Zoo to spend a block of public funds at its own discretion, as if the funds were private, violates the clear intent of the PRA. See *Telford*, 95 Wn.App. at 164. When considering the purposes of the PRA—open government and government accountability—the Zoo’s receipt of direct funds through a taxpayer levy weigh in favor of finding that the private entity is the “functional equivalent” of a government agency subject to the PRA. The private entity’s funding comes directly from the taxpayers instead of through a government’s discretionary acts.

B. Whether the Public Funds Constitute Less Than a Majority of the Entity’s Funding Does Not Diminish the Significance of Funding through a Parks Levy.

Amicus generally agrees with Appellant that there is no “significant majority” test on the level of government funding factor. The significance of levy funding applies regardless of its percentage ratio to

⁵ King County Ordinance 17568, King County, available at <http://your.kingcounty.gov/dnrp/library/parks-and-recreation/documents/about/Ordinance%2017568.pdf> (accessed April 25, 2016).

the organization's funding. Here, the Zoo's receipt of millions of tax payer dollars is significant for the reasons described above even if the public funds do not constitute a majority of the organization's overall budget.

III. CONCLUSION

WCOG asks this Court to grant the Petition for Review.

Respectfully submitted this 2nd day of May, 2016.

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CERTIFICATE OF SERVICE

I, Margaret Pak Enslow, certify under penalty of perjury that true and correct copies of the above attached document were delivered as follows, with the parties' agreement to accept email service:

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Attached please find the following documents for filing in the case Alyne Fortgang v. Woodland Park Zoological Society, Case No. 92846-1:

1. Motion for Leave to File Amicus Curiae Brief in Support of Petition for Review; and
2. Brief of Amicus Curiae of the Washington Coalition of Open Government in Support of Petition for Review.

Thank you,

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