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No. 69641-6-I

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON**

(Snohomish County Superior Court Cause No. 11-2-09288-5)

AMALGAMATED TRANSIT UNION LOCAL NO. 1576,
INTERNATIONAL ASSOCIATION OF MACHINISTS AND
AEROSPACE WORKERS DISTRICT 160, and LANCE NORTON,
Appellants,

v.

SNOHOMISH COUNTY PUBLIC TRANSPORTATION BENEFIT
AREA CORPORATION dba COMMUNITY TRANSIT, *Respondent.*

RESPONDENT'S BRIEF

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I. INTRODUCTION

This case involves the interpretation of 2010 amendments to RCW 36.57A.050, which adds a nonvoting union representative to the governing bodies of public transportation benefit area corporations. The added language to RCW 36.57A.050 mandates that the nonvoting member comply with all governing bylaws and policies of the authority and regulates the attendance of the nonvoting member at executive sessions of the authority. It further requires the exclusion of the nonvoting member at executive sessions regarding labor negotiations and permits excluding the nonvoting member from all other executive session.

In response to the statutory change, Snohomish County Public Transportation Benefit Area *dba* Community Transit (“Community Transit”) amended its bylaws to address the nonvoting member’s attendance at certain executive sessions. The Amalgamated Transit Union Local No. 1576, International Association of Machinists and Aerospace Workers District 160, and Lance Norton (collectively “ATU”) object to Community Transit’s amended bylaws.

II. STATEMENT OF THE CASE

Community Transit is a municipal corporation (particularly a public transportation benefit area corporation) formed and existing

pursuant to RCW 36.57A that operates and maintains a public transit system. Prior to 2010, Community Transit was governed by a board of elected officials selected from Snohomish County and the cities and towns within the corporation's boundaries as directed by statute. (CP 38-39). In 2010, the Washington State Legislature amended RCW 36.57A.050 requiring Community Transit to add a nonvoting labor representative to Community Transit's board. The amended statute states in relevant part:

There is one nonvoting member of the public transportation benefit area authority. The nonvoting member is recommended by the labor organization representing the public transportation employees within the local public transportation system. If the public transportation employees are represented by more than one labor organization, all such labor organizations shall select the nonvoting member by majority vote. The nonvoting member **shall** comply with all governing bylaws and policies of the authority. The chair or cochair of the authority **shall** exclude the nonvoting member from attending any executive session held for the purpose of discussing negotiations with labor organizations. The chair or cochair **may** exclude the nonvoting member from attending **any other executive session**. The requirement that a nonvoting member be appointed to the governing body of a public transportation benefit area authority does not apply to an authority that has no employees represented by a labor union.

[Emphasis added.]

From its inception in 1976, Community Transit's board has adopted and operated pursuant to bylaws that have been periodically amended. (CP 55-65). Community Transit's bylaws establish board

offices for a chairperson, vice chair Person and secretary. (CP 60). The bylaws also define the duties of these offices. (CP 62). In response to the 2010 amendments to RCW 36.57A, Community Transit's board amended its bylaws to account for the new nonvoting member.

At issue is Community Transit's bylaw provision relating to attendance of the labor nonvoting member at executive sessions:

The Chairperson or the Acting Chairperson shall exclude the nonvoting member of the Board from attending any executive session held for the purpose of discussing negotiations with labor organizations or matters relating to the personnel of Community Transit. The Chairperson or the Acting Chairperson shall allow the nonvoting member to attend an executive session if he or she finds that the attendance by the nonvoting member at the executive session would be in the best interest of the Corporation or not be detrimental to its operations. The decision of the Chairperson or Acting Chairperson shall be final and binding. If the nonvoting member attends an executive session of the Board of Directors, such nonvoting member shall not disclose any information obtained in such executive session to anyone and shall not use such information to further the interest, either directly or indirectly, of any collective bargaining unit or employee(s) of the Corporation. (CP 60).

ATU objected to this provision and sued for a declaration that the provision is legally invalid. The record does not show one instance where the nonvoting member was wrongfully denied attendance at an executive session because of Community Transit's bylaws. At summary judgment, the trial court granted Community Transit's motion dismissing the lawsuit.

III. ARGUMENT

1. **ATU does not have standing to challenge the Bylaw provision.**

The 2010 amendment of RCW 36.57A permits the exclusion of the nonvoting member from every executive session. As a result, ATU cannot point to a single executive session where the nonvoting member was unlawfully excluded. Thus any alleged “injury” is purely speculative. Without being able to demonstrate an actual and real injury, ATU does not have standing to bring this action pursuant to the Uniform Declaratory Judgments Act (UDJA), (RCW Chapter 7.24).

Standing requires ATU to demonstrate that the contested bylaw provision caused the ATU an “injury in fact”. They cannot. In *Grant County Fire Protection Dist. v. City of Moses Lake*, 150 Wn.2d 791, 802, 42 P.3d 394 (2004), the Washington State Supreme Court outlined the following test for determining whether a party has standing under the Uniform Declaratory Judgments Act:

This court has established a two-part test to determine standing under the UDJA. The first part of the test asks whether the interest sought to be protected is “arguably within the zone of interests to be protected or regulated by the statute or constitutional guarantee in question....The second part of the test considers whether the challenged action has caused ‘injury in fact,’ economic or otherwise, to the party seeking standing....Both tests must be met by the party seeking standing.

See also *American Legion Post v. Department of Health*, 164 Wn.2d 570, 192 P.3d 306 (2008).

The record contains no evidence that the ATU has suffered an “injury in fact” as required by the UDJA. The ATU provides no factual testimony that the nonvoting member was excluded from an executive session as a result of the contested bylaw provision and the board chair would otherwise have allowed attendance. To prevail, ATU would need facts in the record that the nonvoting member was excluded from at least one particular executive session solely because Community Transit amended its bylaws. ATU has provided no such evidence.

The nonvoting board member cannot “as a matter of right” attend any executive session at a board meeting, including those executive sessions which relate to matters relating to the personnel of Community Transit. To the contrary, the amended RCW 36.57A.050 allows the board chair to exclude the nonvoting member from every executive session. The statute reads: “The chair or cochairs may exclude the nonvoting member from attending any other executive session.” (Emphasis added). Any alleged injury is speculative because the statute explicitly permits the nonvoting member to be excluded from every executive session. To establish harm under the UDJA, a party must present a justiciable

controversy based on allegations of harm personal to the party that are substantial rather than speculative or abstract. *Grant County Fire Protection Dist.*, 150 Wn.2d at 802. Speculation that the nonvoting member may have the “opportunity” or “possibility” to attend an executive session for personnel matters falls short of an “injury in fact”.

2. The Board can pass bylaws which provide direction and guidelines for the Chair and Acting Chair of the Board

The amended RCW 36.57A.050 clearly contemplates that Community Transit (and all other public transportation benefit area corporations) will adopt bylaws and policies to guide its operations. In fact, amended RCW 36.57A.050 mandates that the nonvoting member comply with all governing bylaws and policies of the authority.

Community Transit is governed by board as set forth in RCW 36.57A.050 and RCW 36.57A.055. These statutes define who can be the members of the “governing body” and how the governing body is selected. Community Transit’s governing body (board), in total, is given all of the management powers of the corporation. The entire Community Transit board manages the agency through its bylaws, resolutions, contracts, policies and actions taken during open public meetings.

The amended RCW 36.57A.050 provides the first and only reference to positions of “Chair” or “Cochair” in Community Transit’s

enabling legislation (RCW 36.57A). Community Transit has adopted bylaws that set forth operating parameters for the board and designate certain board members as officers including Chair and the Acting Chair. The bylaws provide the board a structure for the governance of the organization. Amended RCW 36.57A.050 mandates that the nonvoting member comply with these bylaws.

It was appropriate for Community Transit board to revise its bylaws to provide direction to the chair regarding when the new nonvoting member would be allowed to attend executive sessions. Aside from the exclusion of the nonvoting member from executive sessions held for the purpose of discussing negotiations with labor organizations, the statute does not provide any direction or standards for the chair regarding when to allow or deny the nonvoting member to attend a particular executive session. The statute provides no appeal of the chair's decision even if the majority of the board disagreed. The statute vests the board chair, who is one of nine (9) equal voting board members, with total discretion with no standards to make his or her decision. Such lack of standards is an unconstitutional delegation of authority to the chair. *Biermann v. City of Spokane*, 90 Wn.App. 816, 960 P.2d 434 (1998) sets forth the following long standing rule:

A legislature may delegate authority when it has provided “(1) appropriate standards to define what is to be done, and what administrative body is to accomplish it, and (2) procedural safeguards to control arbitrary administrative action”

This rule is cited in many other Washington Supreme Court cases, such as *State v. Ermert*, 94 Wn.2d 839, 621 P.2d 121 (1980) and *Polygon Corp. v. City of Seattle*, 90 Wn.2d 59, 578 P.2d 1309 (1978). Community Transit’s amended bylaws provide the only procedural safeguards to control arbitrary actions of the chair. The statute contains no such statutory procedural safeguards or guidance regarding when the nonvoting member should be excluded from a particular executive session. Under the statute, the chair could exclude the nonvoting member from all executive sessions for no reason at all. Community Transit’s bylaws properly provide procedural safeguards and guidance for the chair to prevent arbitrary and capricious decision.

In setting such standards, the board has followed its statutory obligation to govern Community Transit. The bylaw provisions do not infringe on the power of the chair or co-chair, because the chair or cochair do not have any separate specific statutory power or authority except as delegated to them in the bylaws.

3. Community Transit's Bylaws Do Not Conflict With Statute

Community Transit's bylaws do not conflict with RCW

36.57A.050. The bylaws of Community Transit are similar to ordinances passed by cities and some counties. The bylaws are a legislative act of the Board of Directors and are not inconsistent with amended RCW

36.57A.050. The Washington State Supreme Court in the case of *King County v. Taxpayers*, 133 Wn.2d 584, 949 P.2d 1260 (1997) stated the following regarding when an ordinance must yield to the state statute:

An ordinance must yield to a statute on the same subject on either of two grounds: if the statute preempts the field, leaving no room for concurrent jurisdiction, or if a conflict exists between the two than cannot be harmonized...

The amended statute clearly does not preempt the field or specifically mandate how the governing board must handle executive sessions. The statute does not limit Community Transit's ability to adopt non-conflicting bylaws. To the contrary, the governing body, in total, is defined as the legislative authority for the agency. Also, the wording of the statute is vague at best and does not provide any inference of intent to preempt the field as to when the nonvoting member of the Board is allowed to attend executive sessions of the Board.

No irreconcilable conflict exists between the state statute and Community Transit's bylaws. For a conflict to exist "...[t]he conflict must be direct and irreconcilable with the statute, and the ordinance must yield to the statute if the two cannot be harmonized..." *Tacoma v. Luvene*, 118 Wn.2d 826, 835, 827 P.2d 1374 (1992). Community Transit's bylaws and amended RCW 36.57A can be harmonized. There is nothing in the statute which states that the Board of Directors cannot direct that the chair of the board to exclude the nonvoting member from certain executive sessions. In fact, due to the lack of standards in the statute, it is imperative that the board give direction to the chair. Otherwise the chair could act in an arbitrary and capricious manner.

ATU goes to some length to introduce evidence relating to the legislative process leading up to the adoption of revised RCW 36.57A.050. The unremarkable legislative history has no bearing on this case. ATU concedes that the language of RCW 36.57A.050 is unambiguous. (Appellants' Brief at 10). Where a statute is unambiguous, legislative intent is determined from the language of the statute alone. *Waste Mgmt. of Seattle, Inc. v. Washington Util. & Transp. Comm'n*, 123 Wn.2d 621, 629, 869 P.2d 1034 (1994); *In re Eaton*, 110 Wn.2d 892, 898, 757 P.2d 961 (1988).

The clear, unambiguous language permits the nonvoting member to be excluded from every executive session. This is far different than *Entertainment Industry Coalition v. Tacoma-Pierce County*, 153. Wn.2d 657, 105 P.3d 985 (2005) cited by ATU. In *Entertainment Industry* a local health board attempted to impose by regulation a blanket prohibition on smoking in public spaces within its jurisdiction. However, there was a State statute that granted property owners the right to regulate designated smoking areas in certain circumstances and places (e.g. restaurants, taverns, bars, bowling alleys etc.). The Court held that the local regulation was invalid because it prohibited the rights granted by the statute. *Id* at 664.

ATU also erroneously relies on *Parkland Light & Water Co. v. Tacoma-Pierce County Bd. of Health*, 151 Wn.2d 428, 433, 90 P.3d 27 (2004) for the premise that Community Transit's bylaws conflict with RCW 36.57A.050. In *Parkland Light*, the Tacoma-Pierce County Board of Health adopted a Resolution mandating chlorination of all water systems within Pierce County. This conflicted with the express statutory grant in RCW Chapter 57 (the enabling legislation for municipal water districts) allowing each individual water district the right (either by vote of the Board of Commissioners or vote of the people) to chlorinate their

independent water system. See RCW 57.08.012. The Court rejected the Health Board's attempt to eliminate the utility's statutory authority to determine whether or not to chlorinate.

In both *Entertainment Industry* and *Parkland Light* it was the party whose discretion was being limited that filed suit. In this case, Community Transit's bylaws limit the discretion of the board chair. Only the board chair, not ATU, has any possible standing to complain.

ATU does not have the right to attend any executive session. Had the legislature wanted to grant the nonvoting member specific rights to attend executive sessions it could have done so.

4. If the Community Transit's bylaws conflict with RCW 36.57A, the amended statute should be invalidated as unconstitutional.

RCW 36.57A, prior to the 2010 amendment, defined the governing body of Community Transit as the sole legislative authority with each member having an equal vote in making decisions. The amended RCW 36.57A arbitrarily elevates the position of "chair" above other board members in conflict with the remaining provisions of RCW 36.57A and sets up two separate classes of board members. In *Hunter v. North Mason School Dist*, 85 Wn.2d 810, 814, 539 P.2d 845 (1975) it was held that statutory classifications that alter the rights of some individuals but not

others are permissible under the equal protection clause of the Fourteenth

Amendment only if they are:

Reasonable, not arbitrary andrest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.” *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920).

Amended RCW 36.57A.050 arbitrarily grants the board chair a right different from the other board members. All other Community Transit board actions require the majority vote of the members present at a meeting that has a quorum of the board. Since the statute that dictates how the board is constituted does not differentiate the rights and obligations of board members, the amended language granting the chair special powers and violates the constitutional principle of one person one vote. See *Cunningham v. Metropolitan Seattle*, 751 F. Supp. 885 (W.D. Wash. 1990). The statute as written would allow the board chair to exclude the nonvoting member even if the remaining eight (8) other board members wished him or her to attend.

IV. CONCLUSION

For all of the foregoing reasons, Community Transit respectfully request that the Court affirm the trial court’s summary judgment order dated November 16, 2012.

DATED THIS 20th day of March, 2013.

Respectfully submitted,

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