

No. 44139-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

MASON COUNTY, a Washington municipal corporation, MASON
COUNTY BOARD OF COMMISSIONERS, the legislative body of
Mason County, and REGIONAL DISPOSAL COMPANY,

Appellants,

v.

ADVOCATES FOR RESPONSIBLE GOVERNMENT, a Washington
nonprofit corporation, and DOES 1-10,

Respondents.

**REPLY BRIEF OF APPELLANT
MASON COUNTY**

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I. INTRODUCTION

Advocates for Responsible Government and its individual members named as plaintiffs in the trial court are identified herein collectively as “ARG.”

In reply to ARG’s response to appellants’ opening briefs, Mason County will begin by summarizing each of the assignments of error and sub-points Mason County raised and briefed in its opening brief and will then discuss ARG’s response to each assignment of error and sub-point.

II. ARGUMENT

1. The trial court erred in declaring the 2012 Addendum to Contract Regarding Solid Waste Export Services for Mason County “null and void” and in issuing a writ of mandamus requiring Mason County to submit a new “contract for solid waste export and disposal” to a competitive bidding process under RCW 36.32.250 or the request-for-proposal process under RCW 36.58.090.

Mason County adopts and incorporates the reply briefing of RDC on this topic.

2. The trial court erred with respect to that part of its Order that would require the County in any respect to comply with the competitive bidding process under RCW 36.32.250.

Mason County adopts and incorporates the reply briefing of RDC on this topic.

3. The trial court erred and abused its discretion in finding that Advocates or its members had standing to bring the mandamus action.

Mason County's argument in regard to its third assignment of error, as contained in the caption above, appears at pages 26-29 of its opening brief. Each of Mason County's points on this assignment of error are paraphrased below under topic headings (a) through (e) and are followed below by Mason County's reply to each of ARG's response arguments in regard to each topic, as follows:

- (a) ARG and its members lack standing because they have no interest in the proceedings beyond that shared in common by the public.

Under its subheading "1", ARG argues that "[t]axpayers have standing to challenge illegal governmental acts" and that taxpayer suits are

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recognized and allowed, except when those suits encourage unwarranted harassment of public officials. Brief of Respondent's at p. 16.

To support its contention, ARG begins its argument by citing *State ex rel. Boyles v. Whatcom Cnty. Superior Court*, 103 Wn.2d 610, 694 P.2d 27 (1985). *Boyles* involved a county's use of a jail work release program that required inmates to participate in religious activities. *Id.*

The work release program at issue in *Boyles* was self-supporting and, thus, involved only incidental expenditures of public funds. *Id.* 613. In this respect *Boyles* is similar to the instant case, because the solid waste transport contract at issue in the instant case is a self-supported, fee-based system that does not involve taxpayer funds. CP 371-93 (Declaration of John Cunningham, together with attachments).

But the issue in *Boyles* was not about an objection to a payment of public funds; instead, the issue in *Boyles* was a constitutional challenge, rather than a mere statutory challenge, to a government act that favored one religion over another. *Id.* at 613-14. Contrary to *Boyles*, the instant case is not a taxpayer suit to defend constitutional rights. Instead, at issue in the instant case is ARG's contention that, when extending a

contract for the transport of solid waste, Mason County was statutorily required to follow the provisions of RCW 36.58.090.¹

ARG cites *Walker v. Munro*, 124 Wn.2d 402, 419-20, 879 P.2d 920 (1994), to support its contention that “[c]ase law makes clear that taxpayers are not required to show some particularized injury greater than that suffered by other taxpayers.” Brief of Respondent at p. 16. But Mason County asserts that *Walker v. Munro* is not so clearly in support of ARG’s contention on the facts of the instant case.

Walker v. Munro, like *Boyles*, is a case that originated from a suit to enjoin allegedly unconstitutional acts by the government. *Walker v. Munro*, 124 Wn.2d at 405. As contended by ARG, the court in *Walker v. Munro* did acknowledge that taxpayer standing was appropriate in some cases, but beyond ARG’s contention, the court also stated that the doctrine of standing prohibits a plaintiff from asserting the legal rights of another, and the court expressed doubt that plaintiffs could assert taxpayer standing where the challenged government act did not involve an increase in taxes or an increase in the expenditure of public funds. *Id.* at 419-20. In the instant case, ARG has not pointed to any concrete fact to corroborate its

¹ Mason County continues to assert that RCW 36.58.090 is a statutory authorization of an alternative bidding process that pertains only to the management, design, etc., of solid waste facilities and that it does

argument that either it or the public will incur a tax or an expenditure of public funds because of Mason County's extension of its fee-based solid waste transport contract.

ARG cites *State ex rel. Boyles v. Whatcom Cnty. Superior Court*, 103 Wn.2d 610, 614, 694 P.2d 27 (1985), and *Eugster v. City of Spokane*, 139 Wn. App. 21, 28, 156 P.3d 912 (2007), and argues that a single taxpayer may have standing even if that taxpayer's injury is one that is common to all citizens. Brief of Respondent at p. 17. But while ARG has argued and alleged injury to taxpayers, it has not corroborated its allegation with evidence and a citation to the record. The record shows only that Mason County's contract for solid waste transport is a fee-based system. CP 371-93 (Declaration of John Cunningham, together with attachments).

ARG cites *Dick Enterprises, Inc. v. Metro. King Cnty.*, 83 Wn. App. 566, 569, 922 P.2d 184 (1996), to support its contention that "a taxpayer may... sue to enjoin the execution or performance of a wrongful public contract...". Brief of Respondent at p. 17. But a complete statement of the court's comment should include the words beyond the second ellipses, to include the qualifying language that appears in the

not apply to contracts regarding the transportation of solid waste from the facility.

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original text, as follows: “A taxpayer may also sue to enjoin the execution or performance of a wrongful public contract *that would increase the tax burden* [emphasis added].” *Id.* There is no evidence of an increase in the tax burden in the instant case; the evidence shows that there is no tax increase. CP 371-93 (Declaration of John Cunningham, together with attachments).

ARG quotes from *Times Pub. Co. v. City of Everett*, 9 Wash. 518, 522, 37 P. 695 (1894), as follows:

[A]gents of municipal corporations must maintain themselves within the law, in the matter of awarding contracts, and if, through fraud or manifest error not within the discretion confided to them, they are proceeding to make a contract which will illegally cast upon taxpayers a substantially larger burden of expense than is necessary, the courts will interfere by injunction to the effect of restricting their action to proper bounds.

Brief of Respondent at p. 18.² In reply, Mason County asserts that the quoted language above has no application to the instant case, both because there was no fraud or manifest error involved in Mason County’s extension of its solid waste transport contract, and because ARG has not, and cannot, make a showing that taxpayers will incur a substantially larger burden of expense than is necessary due to this contract extension. ARG’s

² It appears that ARG’s brief inadvertently mixes two quoted passages, together with non-quoted commentary, into one indented quotation. Part of the quoted material is located at page 522 and the remainder at page 524 of *Times Pub. Co. v. City of Everett*, 9 Wash. 518.

assertions to the contrary are mere argument based upon assumptions that are unsupported by actual evidence. ARG also asserts that “plaintiff, as a taxpayer, had ‘a direct and substantial interest in the controversy, as being one who is liable to be taxed, in common with the general public, for the work contracted for....’” Brief of Respondent at p. 18, quoting *Times Pub. Co. v. City of Everett*, 9 Wash. 518, 524, 37 P. 695 (1894). But the quoted material does not support ARG’s contention -- because neither ARG collectively nor any of the individually named plaintiffs, nor any of the general public, are liable to be taxed due to the contract extension at issue in the instant case. The contract is funded by user fees rather than tax revenue. CP 371-93 (Declaration of John Cunningham, together with attachments).

As a final point on this topic, ARG asserts that its individual members would in any event have standing under RCW 36.58.090 “to sue in their own right as taxpayers of Mason County.” Brief of Respondent at p. 19. ARG’s reasoning on this assertion is premised upon its assertion that counties are required to follow the alternative bidding procedure described by RCW 36.58.090 when entering into contracts for the transport of solid waste. ARG argues that “RCW 36.58.090, by its own terms, acknowledges the public interest it seeks to protect.” Brief of Respondent at p. 19. But ARG supports its argument by alleging facts for

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which it provides no citation to the record on appeal as required by RAP 10.3(a)(6) and 10.4(f).

ARG argues that its assertion of standing is justified because “the contract in question went into effect on June 5, 2012, thereby creating a controversy of serious public importance which immediately affected all taxpayers in Mason County.” Brief of Respondent at pp. 19-20. But ARG provides no citation to the record. Instead, ARG provides mere argument, as opposed to evidence, and fails to demonstrate that even a single taxpayer is detrimentally affected.

Mason County urges in reply in that ARG’s arguments are not entitled to a presumption of factual accuracy and that, notwithstanding ARG’s arguments to the contrary, it is more fair to argue that Mason County’s extension of its existing solid waste transport contract provides a benefit to all citizens of Mason County, irrespective of taxpayer status, because the contract is funded by user-fees rather than tax funds. CP 371-93 (Declaration of John Cunningham, together with attachments). And, it is fair to argue that Mason County’s continuation of an established relationship with a proven-to-be-reliable, known provider is a legitimate exercise of police powers by the legislative authority of Mason County, and that the legislative authority is entitled to deference when acting in the best interest of the public by limiting the risks of an unsanitary build-up of

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solid waste in the community and by limiting the risks of environmental liability in the event of mishandled transport services. Wash. Const. Art 11, § 11; *Ventenbergs v. City of Seattle*, 163 Wn. 2d 92, 178 P.3d 960 (2008); *State ex rel. Faulk v. CSG Job Ctr.*, 117 Wn. 2d 493, 504, 816 P.2d 725 (1991) (when determining whether legislation promotes public welfare, court “must presume that if a conceivable set of facts exists to justify the legislation, then those facts do exist and the legislation was passed with reference to those facts”); *CLEAN v. City of Spokane*, 133 Wn.2d 455, 468, 947 P.2d 1169 (1997) (in context of questioning expenditure of public funds to build public project, court must defer to judgment of legislative authority if public benefit “is at least ‘debatable’”).

- (b) ARG lacks standing to assert the rights of its members because it did not meet its burden of establishing that its members would have standing to sue in their own right.

Under its subheading “2”, ARG argues that it has standing because “ARG’s interest in protecting the taxpayers of Mason County from illegal government action is germane to the organization’s purpose.” Brief of Respondent at p. 20. But ARG has not provided a citation to the record on appeal to support its factual assertion as required by RAP 10.3(a)(6) and 10.4(f).

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First, ARG's factual assertion requires that the court adopt ARG's contention that Mason County's contract extension at issue in this case is "illegal," but as argued elsewhere in these briefs, Mason County does not agree with ARG's contention.

Secondly, ARG states in its briefing that it is a "nonpartisan organization committed to ensuring that the residents and businesses of Mason County are informed, educated and fairly represented...." Brief of Respondent at p. 20-21. But rather than supporting its factual assertion by providing a citation to record on appeal as required by RAP 10.3(a)(6) and 10.4(f), ARG instead attempts to reach outside of the record on appeal by providing a link to a website. ARG provides no explanation about the website.

ARG cites *Mukilteo Citizens for Simple Gov't v. City of Mukilteo*, 174 Wn.2d 41, 272 P.3d 227 (2012), as authority for its contention that ARG has standing because it is "an organization... formed for the express purpose that the lawsuit seeks to achieve." Brief of Respondent at p. 20, quoting *Mukilteo Citizens for Simple Gov't* at 46. But ARG provides no citation to the record in compliance with RAP 10.3(a)(6) and 10.4(f) to support its assertion regarding what it hopes to achieve with its lawsuit.

Merely stating a mission does not make it so. Merely stating that one is "non-partisan" is not proof that one is non-partisan. Without a

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citation to evidence in the record, rather than being entitled to an assumption that it is motivated by the best interests of all Mason County taxpayers, ARG's purpose might just as well be that it is motivated by a desire to embarrass a public official, to thwart competition in the solid waste business, or for some other purpose.

ARG alleges that "Mason County was neither transparent, nor fiscally responsible in awarding this contract to RDC." Brief of Appellant at p. 21. ARG's factual assertion is unsupported by citations to evidence in the record. In reply, Mason County asserts that this factual assertion by ARG is incorrect. The contract extension was discussed extensively at public meetings. CP 121-29, 423-24. And ARG's judgment of what is fiscally responsible for Mason County should not be entitled to deference. See, e.g., Wash. Const. Art 11, § 11; *Ventenbergs v. City of Seattle*, 163 Wn.2d 92, 178 P.3d 960 (2008); *State ex rel. Faulk v. CSG Job Ctr.*, 117 Wn.2d 493, 504, 816 P.2d 725 (1991); *CLEAN v. City of Spokane*, 133 Wn.2d 455, 468, 947 P.2d 1169 (1997). Immediately after ARG states in its brief that Mason County was "not fiscally responsible" it then contradicts itself by stating that it has "no way of knowing whether the contract with RDC is the most fiscally responsible option for the County...." Brief of Appellant at p. 21.

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Even if ARG genuinely believes that it acts in the fiscal best interests of Mason County taxpayers, merely asserting so without citation to proof in the record does not make it so, and neither does it justify an expensive and disruptive lawsuit that ultimately burdens the people of Mason County. See, *Reiter v. Wallgren*, 28 Wn.2d 872, 184 P.2d 571 (1947)(discussing harmful consequences of allowing legislative decisions to be challenged by lawsuits); see also, *Dick Enterprises, Inc. v. Metro. King Cnty.*, 83 Wn. App. 566, 570-71, 922 P.2d 184 (1996)(discussing harm due to costs of delay and rebidding).

- (c) For ARG or any one of its members to have standing as a plaintiff below, the individual plaintiff must show that it pays the kind of tax that funds the project that is the subject of the lawsuit.

ARG has not responded to this issue. But Mason County has not abandoned this issue.

When bringing a taxpayer's cause of action, "the plaintiff must show that it pays the type of taxes funding the project." *Dick Enterprises, Inc. v. Metro. King Cnty.*, 83 Wn. App. 573, 922 P.2d 184 (1996). ARG has not shown that it pays the kinds of taxes that fund the contract that it disapproves of; it cannot make this showing because the contract is fee-

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based. CP 371-93 (Declaration of John Cunningham, together with attachments).

- (d) For ARG or any one of its members to have standing as a plaintiff below, the individual plaintiff must show that before initiating the lawsuit the plaintiff asked the Attorney General to take action and that the request was refused by the Attorney General.

At pages 22-24 of its brief, under its subsection "4", ARG concedes that it was required in this case to seek the help of the Attorney General before bringing suit in this case, but ARG argues that it was excepted from this requirement because its request to the Attorney General would have been useless. ARG argues that its assertion that its request would have been useless is proved by the Attorney General's subsequent declination to file suit, which occurred when ARG requested the Attorney General's help "approximately three weeks after filing" suit. Brief of Respondent at p. 23.

In order to bring a taxpayer suit, ARG was required to ask "the Attorney General's office to take action *before* [emphasis added] bringing suit." *Dick Enterprises, Inc. v. Metro. King Cnty.*, 83 Wn. App. 566, 573, 922 P.2d 184 (1996); see also, *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 269, 534 P.2d 114 (1975); *Reiter v. Wallgren*, 28 Wn.2d 872, 184 P.2d 571 (1947).

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- (e) Only one of the individual plaintiffs asked the Attorney General to take action, but the plaintiff's letter to the Attorney General alleged insufficient facts and law to warrant action by the Attorney General.

ARG argues that it could not have provided a better case for intervention by the Attorney General because, “[i]f Mason County did nothing wrong in the first place, as they have alleged all along, then what facts could the letter have alleged that would have justified intervention by the Attorney General?” Respondent’s Brief at p. 23.

If ARG’s lawsuit has no merit, then it is to be expected that the Attorney General would decline involvement; only if the lawsuit has merit should it be expected that the Attorney General would file suit.

- 4. The trial court erred in ruling that Mason County violated the Open Public Meetings Act based on its finding that the “Board of Mason County Commissioners did not discuss the contract ... in an open public meeting at any time in 2012 prior to the June 5, 2012 meeting at which the ... contract was approved.”

ARG has not responded to this issue in its response brief. But Mason County continues to assert the issue and to seek the court’s review as it is briefed in Mason County’s opening brief.

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5. The trial court erred in finding that Mason County violated the Open Public Meetings Act because Advocates failed to raise or argue the issue after filing its petition.

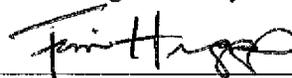
ARG has not responded to this issue in its response brief. But Mason County continues to assert the issue and to seek the court's review as it is briefed in Mason County's opening brief.

III. CONCLUSION

On the basis of the foregoing, Mason County and the Mason County Board of Commissioners, joined by Regional Disposal Company, respectfully renews its requests that the Court of Appeals reverse the trial court's Judgment and Order Granting Writ of Mandamus and Declaratory Relief and reinstate the 2012 Addendum to Contract Regarding Solid Waste Export Services for Mason County.

Respectfully submitted this 23rd day of May, 2013.

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