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Supreme Court Case No. 92140-7
Superior Court Case No. 14-2-03362-5

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

JOHN LEY; WILLIAM CISMAR; DAN COURSEY;
MARK ENGLEMAN; CARL GIBSON; TOM HANN;
JOHN JENKINS; SHARON LONG; LARRY MARTIN;
GREG NOELCK; HARVEY OLSON; LARRY
PATELLA; BRIAN PECK; BRIAN PEABODY; FRAN
RUTHERFORD; GARY SCHAEFFER; TOM
SHARPLES; CHARLES STEMPER;
and DON YINGLING,

Petitioners,

v.

CLARK COUNTY PUBLIC TRANSPORTATION
BENEFIT AREA, a Washington Public
Transportation Benefit Area,

Respondent.

~~(APPELLANT'S)~~ PETITIONER'S REPLY BRIEF

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I. INTRODUCTION

For years C-TRAN has failed to consider or account for the constitutionally imposed spending limitations applicable to the sales and use tax levies approved by voters in 2005 and 2011 (“2005 Levy” and “2011 Levy” and collectively, the “Levies”). The agency seeks to now rationalize its spending of revenue from the Levies on the Bus Rapid Transit Project (“BRT Project”) by championing an overbroad interpretation of the enabling resolutions of the Levies. BR-05-021 and BR-11-004 (“Enabling Resolutions”). As a practical matter, whatever the ruling of this Court, C-TRAN’s current practice of commingling funds from the Levies and other sources will prevent the agency from being able to ensure compliance with any constitutional spending limitations applicable to revenue from the Levies.

C-TRAN asks this Court to support its strained interpretation to allow revenue from the Levies to be spent on any project that can be considered “preservation service” (as that concept is defined in the discretion of C-TRAN), despite plain language in the Enabling Resolutions to the contrary. Further, C-TRAN requests that this Court

bless the agency's plans to spend proceeds of the Levies on any project regardless of its connection to the original purpose of the Levies. Brief of Respondent, p. 28.

If granted, these requests would effectively remove all limitations on C-TRAN's spending of revenue from the Levies. The most glaring evidence of this is C-TRAN's argument that the agency is still justified in spending revenue from the Levies on the BRT Project, even if the BRT Project is beyond the scope of the stated object of the Enabling Legislation. Brief of Respondent, pp. 1, 29, 31. Such spending is clearly at odds with both Article VII § 5 of the Washington Constitution, which limits spending of tax revenues to those purposes that are stated distinctly in the tax legislation, and the holding of this Court that local governments may only spend voter-approved taxes as directed by the voters themselves. *Sane Transit v. Sound Transit*, 151 Wn.2d 60, 68, 85 P.3d 346, 350 (2004).

In contrast, Petitioners ask this Court to interpret the Enabling Resolutions consistently with the rules of contract construction, as would limit C-TRAN's authority to spend revenue from the Levies to matters that are of the same class and nature as expenditures identified in the plans

specifically funded under the Enabling Legislation.

The facts of this case demonstrate that spending revenue from the Levies on the BRT Project is beyond the intended object of the Levies as stated in the Enabling Resolutions, and therefore inconsistent with Article VII § 5. Had C-TRAN desired unfettered discretion to spend revenue from the Levies, it should have drafted the Enabling Resolutions to explicitly provide such discretion, not seek to retroactively interpret such discretion into the Enabling Resolutions, as the agency is attempting here. The trial court's grant of summary judgment in favor of C-TRAN should be overturned.

II. STANDARD OF REVIEW

To determine the meaning of voter approved tax legislation such as the Levies, Washington Courts employ the rules of contract construction. *Sane*, 151 Wn.2d at 69. The Brief of Respondent incorrectly states that the rules of statutory interpretation are applicable to determine the meaning of the Enabling Resolutions. Brief of Respondent, p. 15.

Additionally, when interpreting tax legislation such as the Enabling Resolutions, courts construe the enabling instrument "most

strongly against the taxing power and in favor of the taxpayer, consistent with our constitution's requirement that every law imposing a tax shall state distinctly the object of the same to which only it shall be applied." *In re Estate of Bracken*, 175 Wn.2d 549, 563, 290 P.3d 99, 105 (2012)(Internal quotation marks and citations omitted); *see also Gould v. Gould*, 245 U.S. 151, 153, 38 S.Ct. 53 (1917). ("In case of doubt [taxing statutes] are construed most strongly against the Government, and in favor of the citizen.")¹

III. ARGUMENT IN REPLY

A. Article VII § 5 Taxpayer Protections and Spending Limitations Should be Clarified and Enforced.

C-TRAN concedes that the Enabling Resolutions contain no explicit authorization for C-TRAN to spend Levy revenues on the BRT Project or any significant capital project. This alone is sufficient for this Court to find in favor of Petitioners. Article VII § 5 requires the enabling

¹ C-TRAN argues that this rule of construction is limited to "tax collections, not tax expenditures." Response Brief, p. 16, FN 10. No authority is cited in support of this supposed distinction, and the argument misses the point because the same tax legislation is at issue whether a case arises from the collection or expenditure of the tax, and the underlying principle on which this presumption is based, Article VII § 5, is conceded as applicable in this instance.

legislation of taxes to “state distinctly the object of the same to which only it shall be applied.” (emphasis added). C-TRAN has conceded that the Levies enabling legislation contain no distinct statement that the BRT Project or significant capital improvements are authorized applications of the Levy proceeds. This appears to be at odds with the Article VII § 5 requirement to “state distinctly” the sole object on which a tax can be spent, not to mention the direction from the U.S. Supreme Court that “in the interpretation of statutes levying taxes it is the established rule not to extent their provisions, by implication, beyond the clear import of the language used, or to enlarge their operations so as to embrace matters not specifically pointed out.” *Gould*, 245 U.S. at 153. Should this Court agree, it follows that expenditure on revenue from the Levies on the BRT Project violates Article VII § 5 and must cease.

Lacking any explicit authorization to spend revenues from the Levies on the BRT Project, C-TRAN instead focuses its argument on a theory that use of the word “preserve” renders the intent of the Enabling Resolutions sufficiently broad to imply discretion for C-TRAN to spend revenue from the Levies on the BRT Project. This argument is based on the unstated insinuation that the Article VII § 5 “state distinctly”

requirement is sufficiently pliable to be satisfied by the retroactive interpretation of ambiguous language in voter approved tax legislation to imply discretion for a taxing agency to spend tax revenue on unidentified capital projects. Here, C-TRAN offers the inchoate concept of “preservation” as the distinctly stated object of the Levies, and asks the Court for leave to define that concept, which in turn determines its spending discretion, as broadly as the agency sees fit.

Finding such an implied grant of discretion in ambiguous language would encourage taxing agencies to employ vague and evasive drafting of enabling legislation to provide to voters, knowing that the agency will have seemingly unlimited latitude to interpret such ambiguities after adoption or voter approval. Such a state of the law undermines the apparent objective of Article VII § 5 to ensure that tax spending is limited to clearly and distinctly stated objectives found in enabling legislation. Absent any tangible or distinct details and context, “preservation” as a stand-alone concept is not such an objective as can satisfy Article VII § 5 and this Court need not engage in further construction of the Enabling Resolutions in order to determine if “preservation” actually is the object of the Levies.

The Court should take this opportunity to clarify and articulate the taxpayer protections and agency spending limitations that are provided under Article VII § 5, in particular as apply to instances such as this when a taxing agency has drafted and voters have adopted enabling legislation that is less than distinctly states the object on which tax revenues can be spent. The need for such clear guidance is made evident by the Brief of Respondent in which C-TRAN espouses its belief that so long as the agency “preserves service” (as determined in the sole discretion of C-TRAN), that any additional revenue from the Levies can be spent on any projects at C-TRAN’s discretion regardless of consistency with the stated object of the Enabling Resolutions. The sole rationale offered in support of this expansionist interpretation is that the Enabling Resolutions “do not prohibit the use of sales tax revenues for any projects so long as the stated goal of preservation is satisfied.” Brief of Respondent, p. 28. C-TRAN’s argument that silence in the Enabling Resolutions equates to a grant of unfettered spending discretion completely inverts the Article VII § 5 mandate that tax legislation distinctly state the objects on which taxes may be spent. Direction from this Court is needed to keep C-TRAN sales and use tax spending within constitutional limitations.

Further evidence of the need for guidance from this Court is the uncontested fact that C-TRAN fails to account for its different sources of sales and use tax, even though the limitations on the spending revenue from the Levies are more strict than the limitations of the 1980 Levy.² Even with clarity from the Court on the scope and nature of the Article VII § 5 spending limitations on the Levies, C-TRAN still has no way of determining which of its three sales and use tax levies are the origin of any given dollar spent by the organization. Accordingly, Petitioners ask the Court not only to assist C-TRAN and its taxpayers by identifying the constitutional limitations on spending proceeds from the Levies, but also to direct C-TRAN to undertake an independent accounting of its sales and use tax proceeds and spending, consistent with such limitations.

With that foundation of constitutional issues, this Court need only consider the following arguments on construction of the Enabling Resolutions if this Court determines that Article VII § 5 permits both: (1)

² The enabling resolution (80-07) provides an example of how to distinctly state the object on which tax revenues can be spent. It reads, "For the purpose of fixing and imposing a sales and use tax for the sole purpose of municipal public transportation." CP 357. Had C-TRAN included such language in the Enabling Legislations, voters would have been informed of the breadth of agency spending discretion and the current dispute could have been avoided.

tax legislation that implies discretion to spend on significant capital projects without distinctly stating such a grant of discretion; and (2) the concept of “preservation,” without further parameters or definition, to be sufficient to constitute a distinctly stated object of tax legislation.

B. C-TRAN’s “preservation” theory is inconsistent with the rules of contract construction

Application of the rules of contract construction demonstrate that the object of the Levies is not “preservation” as a stand-alone concept. As a threshold matter, C-TRAN’s argument incorrectly applies the rules of statutory interpretation in the place of the rules of contract. Brief of Respondent, p. 15. Because the Levies are voter approved legislation, the more strict rules of contract construction are to be applied. *Sane*, 151 Wn.2d at 69. Further, because the Levies are tax legislation, they should be construed in favor of the tax payer and not the taxing agency. *Estate of Bracken*, 175 Wn.2d at 563.

It appears that the parties agree that the object of each of the Levies is found in the Enabling Resolutions. BR-05-021, the enabling resolution for the 2005 Levy states, in pertinent part, that:

“NOW, THEREFORE, BE IT
RESOLVED by the C-TRAN Board

of Directors that a proposition be placed on the September 20, 2005 primary ballot, authorizing the imposition of a up to an additional 0.2 percent sales and use tax for the purpose of the funding C-TRAN's Service Preservation Plan, which preserves current service levels ... ”

CP 1311. A plain reading of this provision lends itself to the construction that the object of the 2005 Levy is “funding C-TRAN's Service Preservation Plan” and that “preserv[ing] current service levels” is simply a general statement of what the Service Preservation Plan aims to achieve. Conversely, C-TRAN asks this Court to completely ignore the Service Preservation Plan, and construe the Levy so that its sole purpose is preservation, despite plain language to the contrary. Such a strained interpretation is hardly consistent with the reasonable and ordinary meaning of this language.

The general term preservation should not control over the specifically stated object of funding the Service Preservation Plan. The maxim *ejusdem generis* provides that when a general term follows a specific term or terms, “the general term should not be given its broadest possible meaning, but rather should extend only to matters of the same

general class or nature as the terms specifically enumerated.” *Kitsap County v. Allstate Ins. Co*, 136 Wn. 2d 567, 590-91, 964 P.2d 1173, 1185 (1998). Consistent with this principle, the general term “preserves current service levels” should not be interpreted to expand the scope of the Levy beyond the specifically stated purpose of funding the Service Preservation Plan and matters that are of the same class or nature as the Service Preservation Plan.

BR-11-004, the enabling resolution for the 2011 Levy, follows a similar construction in that it states a specific intent to fund the Core Bus and C-VAN Service Preservation Plan, but also the general objective of preservation. CP 458. Accordingly, this Court should apply the maxim of *ejusdem generis* when constructing the Enabling Resolutions of both Levies. Pursuant to the application of contract construction rules, the object of the 2005 Levy is to fund the Service Preservation Plan and matters of the same class or nature as the Service Preservation Plan, and that the object of the 2011 Levy is to fund the Core Bus and C-VAN Service Preservation Plan and matters of the same class or nature as the Core Bus and C-VAN Service Preservation Plan.

As discussed, the BRT Project is not of a similar class or nature to

the measures included in the Service Preservation Plan or the Core Bus and C-VAN Service Preservation Plan, since neither plan includes or otherwise authorizes spending on any significant capital construction projects. Thus, this Court should find that C-TRAN is not authorized to spend proceeds of the Levies on the BRT Project.

The Brief of Respondent cites no authority to the contrary. C-TRAN relies on *Cook v. Brateng*, 158 Wn. App. 777, 262 P3d 1228 (2010) and *Delaware Dep't of Natural Res. & Envtl. Control v. U.S. Army Corps of Engineers*, 685 F.3d 259 (3rd Cir. 2012) in support of the agency's favored overbroad definition of preservation. These cases are not controlling because one applies Delaware statutory interpretation standards, as opposed to Washington contract construction rules, and both are so factually distinct from this case as to be inapposite. In *Cook*, the Washington Court of Appeals found that the "preservation of real estate" could include remodeling the kitchen in an existing home. *Cook*, 158 Wn. App. at 794. At issue was the relatively innocuous \$20,000 expenditure on a kitchen remodel. Such an undertaking pales in comparison to the proposed BRT Project, which at an initial price of approximately \$53,000,000, is likely more costly than all of the buses and infrastructure

C-TRAN currently employs along Fourth Plain Blvd. Thus, the BRT Project is more akin to building a second, bigger and better house, than to the kitchen remodel in *Cook*. C-TRAN's search for supporting authority in these cases is misplaced.

Petitioners ask this Court to disregard C-TRAN's "preservation" theory and interpret the Enabling Resolutions consistent with the rules of contract construction, which results in C-TRAN's authority to spend revenue from the Levies being limited to matters that are of the same class and nature as the expenditures identified in the plans specifically funded under the Enabling Legislation.

C. Even if the object of the Levies' enabling legislation were "preservation," the stated purpose of the BRT Project is not preservation

The Brief of Respondent goes to great length to try and prove that the BRT Project will achieve C-TRAN's self-imposed objective of "preservation" by spending millions of dollars on capital improvements and bigger busses. However, this rationale is undermined by C-TRAN's own documents supporting the BRT Project. Tellingly, the resolution that authorizes the current version of the BRT Project (BR 12-006), does not once mention the concept of preservation, despite including extensive

findings on the purpose of the BRT Project. CP 26-28. Specifically, BR

12-006 includes BRT Project Purpose and Need Statement that:

“[T]he purpose of the Fourth Plain Transit Improvement Project is to cost-effectively increase transit ridership as well as enhance transit’s comfort, convenience and image by reducing transit travel time, improving trip reliability, and increasing transit capacity to meet current and long-term transit travel demand, while also enhancing the safety and security of the corridor.”

CP 27 (emphasis added). C-TRAN now attempts to shoehorn a major capital project into the concept of “preservation” without any actual findings by the agency that preservation is among the purposes of the BRT Project.

Further, the Alternatives Analysis Report for the BRT Project contains a list of the project goals and objectives. CP 66-67.

“Preservation” is not found on the list. The stated goals and objectives do include “increasing transit ridership,” “increasing transit capacity,” and “increasing transit’s share of trips,” none of which are consistent with preservation of the status quo within the transit system. *Id.* C-TRAN’s adopted BRT Project planning documents belie the agency’s after-the-fact

rationalization that the BRT Project is a preservation measure.

Thus, even if this Court finds preservation to be the identified object of the Levies, the stated purposes of the BRT Project still do not include preservation, rendering the BRT Project beyond the scope of projects for which C-TRAN is authorized to spend revenue from the Levies.

D. Even if the object of the Levies' enabling legislation were "preservation," issues of fact remain as to the meaning of preservation

Absent facts demonstrating the baseline levels of service in place upon adoption of the Levies, there remain outstanding issues of fact as to whether the BRT Project is intended to preserve such levels of service. Even if this Court finds preservation to be the identified object of the Levies, the record in this case does not establish what level of service that C-TRAN is intended to preserve with the revenue from the Levies. There is also no evidence of whether the level of service was the same upon adoption of the 2005 Levy as was in place upon the adoption of the 2011 Levy. In the absence of such a baseline level of service, it is unclear how it can be determined that the BRT Project is intended to or will preserve said level of service. Thus, factual issues remain to be established and the

lower court erred in granting C-TRAN's request for summary judgment.

E. Granting the relief requested by Petitioners' may not end the BRT Project

The C-TRAN budget may be able to fund the BRT Project even without the unconstitutional expenditure of revenue from the Levies.

Petitioners' requested relief amounts to:

- (1) Determination of the Article VII § 5 spending limitations on expenditure of revenue from the Levies;
- (2) Direction to C-TRAN to desist spending proceeds from the Levies on the BRT Project;
- (3) Direction to C-TRAN to undertake a neutral, third-party accounting to ensure current and future compliance with Article VII § 5; and
- (4) Reasonable attorney fees under the common fund doctrine.

In the event that this Court were to grant the full relief requested by Petitioners, C-TRAN may still be able to fund its local share of the BRT Project. C-TRAN has less restricted sources of funding that can legally be allocated toward the local share. Such sources include proceeds from fares and ad sales as well as the 1980 sales and use tax levy.³ 1256.

³ The 1980 levy was also approved by the voters. However, the enabling legislation was less restrictive than that Levies, stating the object of the 1980 levy as being "for the sole purpose of municipal public transportation." CP 357. Had C-TRAN intended to provide

In the 2013-2014 C-TRAN operating budget, the Levies account for approximately \$38,720,000 or 40% of the \$96,089,068 agency budget. CP 1256. The local share of the BRT Project is \$7,400,000. CP 962.

C-TRAN would still be able to employ the non-Levy 60% of its budget as it sees fit, and still has not reached its maximum capacity to levy additional sales and use tax. As a practical matter, a decision of this Court in favor of the Petitioners is unlikely to sound the death knell of the BRT Project or to cause C-TRAN to default on its obligations to the Federal Transit Administration, and more likely to result in C-TRAN revising its budget to account for constitutionally limited funds and re-allocate other funds to the project. Thus, C-TRAN's exhortations to this Court that a ruling in favor of Petitioners will have dire consequences on the future of the agency, leaving it somehow intractably stuck in the past "like an insect frozen in amber," are overstated. Dr. Ian Malcolm⁴ sagely intoned that "Life will find a way," and so too will C-TRAN, with relatively little

such broad spending authority under the Levies, the agency could have used similar language.

⁴ Continuing the reference to the source material for C-TRAN's "insect in amber" simile, Dr. Malcolm is the fictional character in the Michael Crichton novel Jurassic Park, and

disruption, even if this Court grants the Petitioners' requested relief in its entirety.

F. Should Petitioners prevail, a common fund of Levy proceeds will be created, and Petitioners' attorney fees should be provided pursuant to the common fund doctrine

The common fund doctrine is applicable should Petitioners prevail. "The common fund exception to the no-attorney-fees rule applies to cases where litigants preserve or create a common fund for the benefit of others as well as themselves." *Covell v. City of Seattle*, 127 Wn.2d 874, 891, 905 P.2d 324, 333 (1995). Here, Petitioners seek to establish a separate fund for the revenues from the Levies. Such a fund as is necessary to ensure C-TRAN compliance with the constitutional spending limitations intended by the Levies and would inure to the benefit of not only the Petitioners but all persons who pay the C-TRAN sales and use tax. This case also has other hallmarks of the common fund doctrine as Petitioners are seeking to protect constitutional rights effecting a large number of individuals, and is challenging the expenditure of public funds. *See Weiss v. Bruno*, 83 Wn. 2d 911, 914, 523 P.2d 915, 917 (1974). Despite C-TRAN's implication to

the Steven Spielberg film of the same title, in which the character of Dr. Malcolm is portrayed by Jeff Goldblum.

the contrary, the common fund doctrine is not limited to class action claims. *Id.*

IV. CONCLUSION

The record demonstrates that C-TRAN has failed to comply with the spending limitations imposed by the Levies and the Washington Constitution. For the reasons set forth here and in Petitioners' Opening Brief, Petitioners respectfully request that this Court reverse the decision of the trial court that granted summary judgment dismissing Petitioners' claims for declaratory relief against C-TRAN for violation of Article VII § 5, and remand this case back to the trial court. Costs on appeal should be awarded to Petitioners.

DATED: January 21, 2016.

Respectfully submitted,

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/s/ Damien R. Hall

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NOTICE OF FILING AND PROOF OF SERVICE

I certify that on January 21, 2016 I electronically filed the foregoing *PETITIONER'S REPLY BRIEF* using the Washington Judicial Department's eFiling system and mailing a copy to:

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I further certify that on January 21, 2016, I served a copy of the foregoing *PETITIONER'S REPLY BRIEF* by e-service addressed to the following party:

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Attached for filing is Petitioners' Reply Brief. The attorney filing this document is Damien R. Hall, WSBA No. 47688, email address dhall@balljanik.com.

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