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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 STEMPEL, and DON
YINGLING,

Appellants,

v.

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

Respondent.

BRIEF OF RESPONDENT

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 ORIGINAL

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I. INTRODUCTION

Appellants challenge C-TRAN's expenditure of sales tax revenues on the Fourth Plain Bus Rapid Transit ("BRT") Project. The BRT Project preserves bus service in C-TRAN's service area, consistent with the purpose of the 2005 and 2011 sales tax measures. Appellants ask this Court to adopt a narrow definition of preservation and a myopic view of transit planning that would prevent C-TRAN from ever modifying, replacing, or otherwise altering elements of its transit system. Because the BRT Project preserves service, the trial court's order granting summary judgment in C-TRAN's favor should be affirmed.

Apart from challenging C-TRAN's expenditure of 2005 and 2011 sales tax measure revenues on the BRT Project, appellants do not allege that C-TRAN is failing to preserve service. Thus, even if the BRT Project does not preserve service, the Court may affirm the trial court because C-TRAN is meeting its obligation of preserving service under those measures, which is all that they require.

II. COUNTERSTATEMENT OF ISSUE FOR REVIEW

Whether revenue from C-TRAN's 2005 and 2011 sales tax measures, which were passed to preserve C-TRAN's service levels and to prevent service reduction, may be expended on a project that preserves service.¹

¹ This case turns on whether tax measures passed by voters within C-TRAN's boundaries allow the use of the 2005 and 2011 sales tax measure revenue on the BRT Project, not on whether Clark County voters would authorize such a use of these revenues. Although appellants frame the

III. COUNTERSTATEMENT OF THE CASE

C-TRAN is a public transportation benefit area (“PTBA”) created pursuant to Chapter 36.57A RCW. CP 353. C-TRAN’s mission is to provide safe, reliable, and efficient mobility choices to those living within the C-TRAN service area or using C-TRAN’s services.² *Id.* C-TRAN is funded, in part, by three sales and use tax measures, one passed in 1980, one passed in 2005, and one passed in 2011. CP 354.

A. C-TRAN Sales and Use Taxes Measures.

Each month, the State Department of Revenue provides C-TRAN with sales tax receipts in one payment allocation. CP 981-82. This payment includes 0.3 percent from the original 1980 tax measure, 0.2 percent from the 2005 sales tax measure, and 0.2 percent from the 2011 sales tax measure. *Id.* These tax receipts are not segregated into separate funds. CP 982.

1. C-TRAN’s 1980 Sales Tax Measure.

In 1980, C-TRAN approved Resolution No. 80-07, authorizing “[a] retail sales and use tax” at a “rate of . . . three-tenths of one percent of the selling price (in case of a sales tax) or value of the article use [sic] (in

issues pertaining to review as whether “Clark County voters” authorized spending on the BRT Project (Opening Br. at 3-4), C-TRAN’s boundaries are not coextensive with Clark County’s.

² C-TRAN’s service area now includes the cities of Vancouver, Washougal, Camas, Battle Ground, Ridgefield, and La Center; the Town of Yacolt; non-service transportation corridors connecting the city limits of Battle Ground, Ridgefield, La Center, and Town of Yacolt; and the unincorporated areas surrounding the City of Vancouver. CP 353.

the case of a use tax)” for the purpose of public transportation. CP 357. Voters approved this tax.

2. C-TRAN’s 2005 Sales Tax Measure.

In 2005, C-TRAN passed Board Resolution BR-05-021 (“the 2005 Resolution”) authorizing a tax “for the purpose of funding C-TRAN’s Service Preservation Plan, which preserves current service levels and restores innovative services to areas that lost service in 2000” CP 1310-11. C-TRAN passed the resolution to prevent the continued decline of C-TRAN services caused by the loss of the motor vehicle excise tax (“MVET”) matching funds, which eliminated “40 percent of C-TRAN’s revenue and 50 percent of its tax support.” *Id.*³ The overall purpose of the resolution was to preserve service: “the new transit district . . . requires adequate funding to provide service.” *Id.* “[T]he C-TRAN Board of Directors has approved a Service Preservation Plan *that preserves current service levels* and restores innovative services to areas that lost service in 2000.” *Id.* After establishing that additional funds were necessary to continue funding C-TRAN, the resolution states:

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 up to an additional 0.2 percent sales and use tax for the purpose of funding C-TRAN’s Service

³ Appellants’ discussion of the 2004 failed sales tax measure is misleading because it, unlike the 2005 sales tax, was before the voters in all of Clark County. The 2005 sales tax vote occurred after C-TRAN had reduced its boundaries. See CP 1311 (describing C-TRAN’s new boundaries).

Preservation Plan, *which preserves current service levels . . .*

Id. (emphasis added).

The 2005 Resolution was passed during a financial crisis and accurately informed the voters that, if they did not pass the new tax, the agency would be forced to drastically reduce services. *Id.*

The Service Preservation Plan (“2005 Plan”), referenced in the 2005 Resolution, reinforced the principle of preservation. CP 1286 (stating that a major principle of the plan was “**PRESERVING** current transit service levels.” (emphasis in original)). The 2005 Plan stated that C-TRAN would have “to achieve high service performance standards, increase passenger fares every other year to keep pace with inflation, and allocate[] services hours equitably across . . . Local Urban Service” and C-TRAN’s other transit services. *Id.* The 2005 Plan did not prohibit capital improvement projects; on the contrary, it even referenced some projects approved by the C-TRAN Board in March 2004. CP 1292. The 2005 Plan did not discuss what would happen to tax revenues if C-TRAN was no longer facing financial constraints. *See generally* CP 1285-95.

The actual ballot language read:

C-TRAN, Clark County Public Transportation Benefit Area Authority, in adopting Resolution #BR-05-021, authorizes a proposition to increase the sales and use tax by 0.2 percent, or two cents on a \$10.00 purchase, to preserve C-TRAN local fixed route, commuter, and demand response service (C-VAN and the Camas Connector) in the City of Vancouver and its urban

growth boundary, and the city limits only of Camas, Washougal, and Battle Ground; and to restore service to the cities of La Center, Ridgefield, the Town of Yacolt; and the WSU - Vancouver campus.

Should this proposition be:

APPROVED . . . __

REJECTED . . . ____

CP 1307. The measure was approved.

3. C-TRAN's 2011 Sales Tax Measure.

In 2011, C-TRAN approved Board Resolution BR-11-004 ("2011 Resolution") to "preserve C-TRAN's existing local fixed, limited, commuter and Connector service . . . and . . . to meet the anticipated growth of the federally mandated C-VAN, the agency's Paratransit service." CP 458. The 2011 Resolution was passed to address the budgetary shortfall created by the elimination of the MVET matching funds and to make up for the budgetary shortfall created by the economic recession. *Id.* Much like the 2005 Resolution, the 2011 Resolution incorporated a plan, the "Core Bus and C-VAN Preservation Ballot Measure" ("2011 Plan"). *Id.*

The 2011 Plan reiterated that the objective of the ballot measure was to "preserve existing Fixed Route bus service levels." CP 1315.⁴ The

⁴ Appellants' statement that the 2011 Plan "mention[s] the BRT Project" (Opening Br. at 10) is misleading. The BRT system that was discussed in the 2011 Plan is not the same BRT Project at issue here, but rather a component of a larger High Capacity Transportation ("HCT") system that

plan further stated that it would “[f]und existing core bus service levels with focused opportunities for expansion.” *Id.* The plan explained that, if the ballot measure failed, C-TRAN would be forced to reduce service by eliminating various routes. CP 1318. The plan did not discuss what would happen to tax revenues once the agency was in a better fiscal position, because all statements in the plan assumed continuing financial difficulty. *See generally* CP 1315-1326.

The actual ballot measure presented to voters read:

C-TRAN . . . in adopting Resolution BR-11-004, authorizes a proposition to increase the sales and use tax by 0.2 percent, or two pennies on a ten dollar purchase, to preserve C-TRAN local fixed route, limited, commuter and Connector service in the City of Vancouver and its 2005 Urban Growth Boundary, and the City limits only of Camas, Washougal, Battle Ground, La Center, Ridgefield, and the town of Yacolt; and to meet the current and projected growth for Paratransit service, C-VAN.

Should this proposition be:

APPROVED . . .

REJECTED . . .

CP 454. The measure was approved.

included light rail. CP 1315, 1316 (stating that funding an HCT system would come from an alternative funding source). This matter is discussed in more detail in the next section.

B. Failed 2012 Sales Tax Measure.

The 2012 sales tax measure discussed by appellants is not relevant to the BRT Project at issue in this case. Appellants say that the measure involved funding a BRT system “amongst other things.” Opening Br. at 12. “Amongst other things” is an understatement. The 2012 sales tax measure was intended to fund a proposed High Capacity Transportation (“HCT”) system, which required a special tax increase under Chapter 81.104 RCW. CP 1169, 1173. Light rail was the dominant feature of the proposed HCT system, though the HCT system also included BRT as a supporting service. *Id.* The light rail component of the HCT system was eventually abandoned, and the BRT system contemplated as part of that system was altered to create the current BRT Project. *See* CP 355 (stating that no current light rail projects exist), 866 (same); *see also* CP 232 (FTA project profile for BRT, which does not include the HCT system).

The 2012 sales tax measure never presented voters with the BRT Project in its current form as a stand alone project. *See* CP 1173. Instead, it presented voters with an HCT system that featured light rail as its focus and a BRT line as a supporting service for the light rail. *Id.* Even the opposition to the measure focused solely on light rail. *See* CP 1169 (the statements against the tax measure focused solely on light rail). Voters did not reject the current BRT Project in the 2012 measure. No public vote on funding the BRT Project at issue in this case has ever occurred.

Indeed, the BRT Project is ineligible for HCT funding⁵, which was the purpose of the 2012 vote. *See* CP 1169.

C. C-TRAN's BRT Project in the Fourth Plain Corridor.

In 2012, the C-TRAN Board approved the BRT Locally Preferred Alternative ("LPA"), which called for the BRT Project to operate primarily in mixed traffic.⁶ CP 26-28. The BRT Project has been part of C-TRAN's long range vision for years and an earlier version was part of C-TRAN's 20-Year Transit Development Plan. CP 721-734, 737, 743. The C-TRAN resolution approving the LPA identified the Fourth Plain Boulevard as Clark County's highest ridership corridor and cited overcrowding and diminishing trip reliability as problems in the corridor. *Id.* The resolution stated that "the Fourth Plain corridor will experience increases in overall transportation demand, including transit trips, of up to 40 percent between [2012 and] 2035 due to projected population and job growth, which will overtake C-TRAN's ability to adequately serve the Fourth Plain Corridor with existing bus service." *Id.* The Alternatives Analysis Report further found:

The purpose of the Fourth Plain Transit Improvement Project is to cost-effectively increase transit ridership as

⁵ Appellants are not appealing the trial court's determination that the BRT Project is not an HCT System under RCW 81.104.014(2). Consequently, they tacitly acknowledge that the BRT Project at issue here is different from the HCT System at issue in the 2012 vote.

⁶ The LPA did note that the BRT Project would operate and share stations with the then-proposed Light Rail Transit ("LRT") project, but the LRT project has since been terminated. CP 27, 355, 892.

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 63.

The BRT Project will operate between downtown Vancouver and Westfield Vancouver Mall via the Fourth Plain corridor. CP 218. It will replace C-TRAN's current Routes #4 and #44. *Id.* The Fourth Plain corridor has the highest ridership system-wide with frequent overcrowding, which results in service that is often behind schedule. CP 26. The BRT Project will alleviate the overcrowding by using larger buses (60-foot articulated in place of the standard 40-foot buses) that operate more frequently (10-minute peak service instead of the 15-minute peak service today). CP 219, 224, 232. In addition, the BRT Project will construct level boarding platforms at all stations along the corridor, which will allow for individuals using wheelchairs or other mobility devices to board much more efficiently than the current service provides. CP 218. Other BRT Project features include off-board fare collection, self-securing wheelchair bays, and Transit Signal Priority (TSP). *Id.* The net result of all of these BRT components will be travel time savings of up to 10 minutes in each direction, compared to the time it takes to travel from Westfield Vancouver Mall to downtown Vancouver on C-TRAN today. CP 202 (“[T]he LPA is projected to save 8-10 minutes each way . . .”).

The BRT Project will run for 5.9 miles in mixed traffic; buses will jump the traffic queue on Fourth Plain at two intersections. CP 218.⁷

The total projected cost of the current BRT Project is \$53,120,000, of which C-TRAN is responsible for paying \$7,400,000, or approximately 14 percent. CP 23, 240-43. The Federal Transit Administration (“FTA”) has agreed to provide \$38,496,000 through a Small Starts grant and another \$4,000,000 through a Congestion Mitigation and Air Quality Improvement grant. *Id.* Washington State is providing a \$3,000,000 Regional Mobility Grant; the City of Vancouver is providing \$153,000 in local funding; Clark College is providing a right-of-way donation valued at \$60,000; and the Clark College Foundation is providing a right-of-way donation valued at \$11,000. *Id.*

On July 8, 2014, the C-TRAN Board approved allocating \$6.7⁸ million from C-TRAN’s uncommitted cash and investment reserves to fulfill the required local match. CP 258-60, 344, 346. C-TRAN’s uncommitted cash and investment reserves were over \$9 million at the time of the vote. CP 982.

⁷ The Federal Transit Administration’s project profile for the BRT Project fails to fully reflect the project’s updated application, because it inaccurately states that the BRT will operate in an exclusive guideway. *See* CP 232. The FTA is fully aware of this error and knows that the BRT will not operate in an exclusive guideway. CP 237-38.

⁸ The additional \$0.7 million came from C-TRAN’s 2013-2014 budget and its existing capital reserves. CP 241 (listing local funding sources).

D. Procedural History.

Prior to filing their complaint, appellants demanded that the Washington Attorney General take action against C-TRAN. CP 986. Their demand to the Washington Attorney General focused on their now-abandoned argument that the BRT Project is an HCT System. *See id.* The Washington Attorney General refused to pursue any claim against C-TRAN, because such a lawsuit would not satisfy any of the criteria for Attorney General action:

We consider litigation at the request of taxpayers to be appropriate where the action we are asked to challenge is clearly contrary to law, the litigation ultimately would benefit taxpayers in their capacity as taxpayers, and the potential recovery likely exceeds the cost to taxpayers in their capacity as taxpayers, and the potential recovery likely exceeds the cost to taxpayers of bringing the action. Based upon the information provided, I cannot conclude that these criteria are met.

CP 990. After receiving the Attorney General's denial, appellants filed a lawsuit challenging the BRT Project. CP 1-9. Appellants sought a declaratory judgment that the BRT Project was unauthorized under the Washington State Constitution and under the HCT Act, Ch. 81.104 RCW. *Id.* Appellants sought a "declaratory judgment requiring C-TRAN to comply with the voting requirements under the HCT Act and to properly appropriate and expend sales and use tax revenues in pursuit of the BRT financing and implementation, including prior voter approval of BRT financing and implementation." CP 8. Appellants pleaded in the

alternative that, if the BRT Project was not subject to the HCT Act, the BRT Project was *ultra vires*. *Id.* Finally, appellants sought an equitable accounting, asking that the Court appoint an independent auditor to examine C-TRAN's records to ensure that neither 2005 nor 2011 sales tax measure revenue was being used for the project. *Id.*

C-TRAN moved for summary judgment dismissing all claims. CP 956. After hearing oral argument on July 17, 2015, the trial court granted C-TRAN's motion. CP 1591-93. Appellants reviewed the proposed order, approved it as to form and content, and waived notice of presentation. CP 1593. Appellants also requested an interlineation in the order that listed all three of the sales tax measures individually. *See* CP 1592. Appellants subsequently requested a nunc pro tunc order to remove any potential ambiguity that the trial court considered the exhibits accompanying the declaration submitted by appellants.⁹ CP 1594-96. The

⁹ Given the level of involvement that appellants had in the presentation and subsequent revision of the order signed by the trial court, C-TRAN is surprised by appellants' current attack on the form of the order and their claim that the trial court failed to apply the correct legal standard. *See* Opening Br. at 13 (challenging the trial court's lack of specific findings). Appellants never sought reconsideration of the trial court's order to address any of the issues they are now raising. Moreover, the parties agreed in their briefing and during oral argument that the case was governed by *Sane Transit v. Sound Transit*, 151 Wn.2d 60, 85 P.3d 346 (2004). CP 1009; CP 1575; VRP at 19:14-17 (Mr. Hall stating *Sane Transit* laid out how these . . . enacting resolutions are to be construed); VRP at 28:19-21 ("C-tran agrees a hundred percent with the plaintiffs that the operative case her[e] is *Sane Transit vs. Sound Transit*.").

Further, the trial court was not required to enter any findings of fact or conclusions of law on summary judgment. *See Chelan County Deputy*

signed order specifically states that the trial court “determined that there is no genuine issue of material fact.” CP 1592.

Appellants sought direct review by this Court. CP 1589. On September 17, 2015, appellants filed their Statement of Grounds for Direct Review (“Statement”) along with a Motion to Expedite Review. In contrast with their omnibus complaint, appellants now challenge only whether the 2005 and 2011 sales tax measure revenue may be utilized for the BRT Project. Consequently, no legal issues remain as to whether the BRT Project is within C-TRAN’s authority, whether the BRT Project is an HCT system under Chapter 81.104 RCW, or whether C-TRAN may use 1980 sales tax measure revenue on the project.

C-TRAN filed its Answer to the Statement of Grounds for Direct Review on September 25, 2015, and filed an opposition to the Motion to Expedite on September 17, 2015. On November 4, 2015, the Court denied the Motion to Expedite. No ruling has been made on the motion for direct review.

IV. SUMMARY OF ARGUMENT

The BRT Project preserves transit service in C-TRAN’s busiest corridor, while reducing operating costs for years to come. CP 26-28. The Fourth Plain corridor is expected to see demand increases “of up to 40 percent between now and 2035 . . . , which will overtake C-TRAN’s ability

Sheriffs’ Ass’n v. Chelan County, 109 Wn.2d 282, 286, 745 P.2d 1 (1987) (“The trial court unnecessarily entered findings of fact and conclusions of law accompanying the order on summary judgment.”).

to adequately serve the Fourth Plain Corridor with existing bus service.” CP 26. C-TRAN must make investments in each of its fixed routes in order to preserve them for future use, and the BRT Project is such an investment. It will enable C-TRAN to consolidate two routes, provide enhanced service, and maintain its fixed-route service. CP 218.

Both the 2005 and 2011 Resolutions authorize C-TRAN to expend sales tax revenues to preserve service. The grant of authority to preserve service authorizes expenditure of revenues on the BRT Project. To claim, as appellants do, that C-TRAN may not use any of the 2005 or 2011 sales tax measure revenues for any purpose that did not exist in either 2005 or 2011 would prevent C-TRAN from replacing outdated buses with newer models, installing new security systems on buses, updating GPS tracking systems, or increasing the frequency of bus trips on pre-existing routes. Such a myopic view is contrary to the canon of statutory construction that statutes should be construed to avoid absurd results.

The parties generally agree that this dispute over C-TRAN’s use of the 2005 and 2011 sales tax measure revenues is governed by *Sane Transit v. Sound Transit*, 151 Wn.2d 60, 85 P.3d 346 (2004). But the parties disagree on the case’s application. Appellants ask this Court to ignore the plain language of *Sane Transit* and rely on mere declarations of principle to hold that C-TRAN cannot expend revenues from the 2005 and 2011 sales tax measures on the BRT Project. C-TRAN asks this Court to apply the language of the Resolutions as written, and to hold that C-TRAN may expend the 2005 and 2011 sales tax revenues on the BRT Project.

V. ARGUMENT

A. Standard of Review.

Appellate courts “review grants of summary judgment de novo, engaging in the same inquiry as the trial court. Summary judgment is proper where there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” *Citizens Alliance for Property Rights Legal Fund v. San Juan County*, -- Wn.2d --, 359 P.3d 753, 757 (Wash. 2015). “An appellate court may affirm a trial court[’s] disposition of a summary judgment motion on any basis supported by the record.” *Davies v. Holy Family Hosp.*, 144 Wn. App. 483, 491, 183 P.3d 283 (2008).

Courts “appl[y] the same rules of statutory construction to municipal ordinances as to state statutes.” *City of Wenatchee v. Owens*, 145 Wn. App. 196, 202, 185 P.3d 1218 (2008). Under those rules, courts “give effect to the plain meaning of the language used as the embodiment of legislative intent.” *Swinomish Indian Tribal Cmty. v. Wash. State Dept. of Ecology*, 178 Wn.2d at 581. They do not inquire into “the voter’s substantive understanding of what he or she thought he or she was enacting.” *Sane Transit*, 151 Wn.2d at 71. Interpreting the measures requires focusing on the language of the implementing resolutions. *Id.* Plans incorporated into the legislation, by contrast, are mere declarations of principle and are not controlling. *Id.* at 76. Courts do not determine the

meaning of the measure based on “extrinsic documents sent to voters which the average informed voter may or may not have read.” *Id.*¹⁰

B. C-TRAN May Expend 2005 and 2011 Sales Tax Revenue on the BRT Project Because It Preserves and Maintains Service.

Because the BRT Project preserves service, which was the purpose of both the 2005 and 2011 Resolutions, the use of those revenues for the project is proper.

Financing the BRT Project with revenue from the 2005 and 2011 sales tax measure revenues does not violate Washington Constitution article VII, section 5. Article VII, section 5, states in relevant part that “every law imposing a tax shall state distinctly the object of the same to which only it shall be applied.” Const. art. VII, § 5. “It is elementary law that when funds are raised . . . by taxation for a designated purpose they cannot be diverted to some other purpose.” *Thompson v. Pierce County*, 113 Wash. 237, 241, 193 P. 706 (1920). Although minor deviations from voter-approved, tax-funded public projects are permitted, major or substantial deviations are not. *A.H. Larson v. Seattle Popular Monorail Auth.*, 156 Wn.2d 752, 765, 131 P.3d 892 (2006).

¹⁰ The standard of review governing tax legislation, which appellants cite, applies solely to tax collections, not tax expenditures. *See, e.g., In re Estate of Bracken*, 175 Wn.2d 549, 553, 290 P.3d 99 (2012), *superseded by statute on other grounds as recognized by In re Estate of Hambleton*, 181 Wn.2d 802, 335 P.3d 398 (2014) (challenging whether an estate tax should apply); *Ski Acres, Inc. v. Kittitas County*, 118 Wn.2d 852, 853, 827 P.2d 1000 (1992) (challenging authority of Kittitas County to charge a tax). No case applying this rule does so in the context of tax expenditures, which is the subject matter of appellants’ claim.

The parties agree that the central question before this Court regarding the 2005 and 2011 sales tax measures is whether the BRT Project can reasonably be considered within their scope. See Opening Br. at 17-18. The parties also agree that *Sane Transit*, 151 Wn.2d 60, controls the resolution of this question. In *Sane Transit*, the court addressed whether Sound Transit had discretion to alter the length of a light rail line and whether Sound Transit could take more than ten years to build the line. *Id.* at 68. The court considered the resolution (“Resolution 75”), the ballot title, the plan (“Sound Move”) incorporated into Resolution 75, and the brochure sent to voters summarizing Resolution 75. *Id.* at 68-71. The court found that Resolution 75 was the enabling legislation to implement Sound Move, even though voters never actually received Resolution 75—it was over 100 pages long and was available in certain offices in the region. *Id.* at 69, 71-72. Because Resolution 75 provided discretion to Sound Transit in constructing the line, the court found that Sound Transit could deviate from the planned line. *Id.* at 73-74.

The court also rejected arguments that Sound Transit had only ten years to construct the line. *Id.* at 76. The plaintiffs argued that Sound Move clearly imposed a ten-year time limit and that, because Resolution 75 “authorized submission of Sound Move to the voters for their consideration,” this time limit was incorporated into Resolution 75. *Id.* at 65, 74. The court held that the statements in Sound Move “were merely declarations of the principles of the plan[, and] [d]eclarations of principles, purposes, and aims are not operative rules of action and do not give rise to

enforceable rights or create legal obligations.” *Id.* at 76. The court applied this reasoning to disregard language in Sound Move that would have required Sound Transit to finish construction within ten years. *Id.* Instead, the court focused on the language of Resolution 75 and determined that no ten-year time limit actually applied. *Id.* at 76.

1. The BRT Project preserves service under the 2005 and 2011 Resolutions.

In this case, the 2005 Resolution and the 2011 Resolution (collectively, the “Resolutions”) control. The BRT Project fits within the stated preservation goals of the Resolutions, which were intended to preserve service levels. The 2005 Resolution was intended to address the financial crisis C-TRAN faced after losing “40 percent of [its] revenue and 50 percent of its tax support.” CP 1310. The 2005 Resolution stated that it “authoriz[ed] the imposition of up to an additional 0.2 percent sales and use tax for the purpose of funding C-TRAN’s Service Preservation Plan, which preserves current service levels” *Id.* C-TRAN “approved a Service Preservation Plan that preserves current service levels and restores innovative services to areas that lost service in 2000” CP 1311.

The 2011 Resolution, similarly, was intended to close the gap created by the loss of state funding. CP 458. The 2011 Resolution begins by stating that it will fund a “Core Bus and C-VAN Preservation Ballot Measure.” *Id.* The resolution also states that C-TRAN attempted to “narrow the gap created by the loss of the state match” when it put the 0.2 percent sales tax before voters in 2005. *Id.* “C-TRAN in subsequent years

continued to use capital reserve funds to maintain existing service levels as part of the plan approved by voters and has in recent years experienced a substantial reduction in sales tax revenue from the historic economic recession.” *Id.* The 2011 Resolution further states that C-TRAN “determined that a 0.2 percent sales and use tax increase will preserve C-TRAN’s existing local fixed route, limited commuter and connector service [and fund paratransit services].” *Id.*

The BRT Project does not deviate from the stated purposes of the Resolutions but rather promotes preservation of service.¹¹ Neither the Resolutions nor the materials in the voters’ pamphlets provided specific insight into the term “preserve” used by both Resolutions (other than to prevent service reductions). *See* CP 454, 458, 1307-11. The plain meaning of “preserve” is to “maintain”; “keep safe from injury, harm, or destruction”; or “keep alive, intact, in existence, or from decay.” *Webster’s Third New Int’l Dictionary*, Unabridged, <http://unabridged.merriam-webster.com> (last accessed Feb. 18, 2015).¹²

“Preserve” does not and cannot mean stasis. Rather, the concept of “preservation” includes improvements necessary to maintain something,

¹¹ Contrary to appellants’ claim that the purpose of the Resolutions is somehow narrower than preserving service, (Pet’r’s Opening Br. at 29) appellants’ Amended Complaint alleges that the 2005 and 2011 measures were intended to preserve existing service. CP 3-4.

¹² Nor do the 2005 or 2011 Plans themselves define preservation. Rather, the plans, which do not legally control here, explain the service cuts that would result if the tax increases were not passed. CP 1285-97, 1315-27.

which may evolve over time. See *Cook v. Brateng*, 158 Wn. App. 777, 794, 262 P.3d 1228 (2010); *Del. Dep't of Natural Res. & Env'tl. Control v. U.S. Army Corps of Engineers*, 685 F.3d 259, 284 (3d Cir. 2012). For instance, in *Cook*, the court allowed a trustee to utilize trust funds to maintain and remodel a home that was trust property. 158 Wn. App. at 794. The court reasoned that “the plain meaning of ‘preservation’ and ‘preserve’ indicate that [the trustee] could not only maintain the [trust] house, but also could use trust funds to improve the house. Preserving a house entails keeping it as an appreciating asset.” *Id.* Similarly, in *Delaware Department of Natural Resource & Environmental Control*, the court explicitly recognized this evolving nature of preservation when it held that the Army Corp. of Engineers’ deepening of a navigation channel constituted maintaining navigation:

[I]t is likely the phrase “maintain navigation” encompasses activities, such as the deepening project, that improve a body of water in order to keep navigation levels steady in light of changes to commercial markets, technology, and environmental conditions. While neither “maintain navigation” nor its component words are explicitly defined in the Clean Water Act, there is no evidence that Congress intended the phrase to encompass only those activities that preserve bodies of water as they existed in 1977, when the statutory language was inserted. See Clean Water Act of 1977, Pub. L. No. 95–217, 91 Stat. 1566. Arguably, such a reading would be irrational. *Given that navigation evolves over time, limiting the Corps to preserving rivers as they were in 1977 could have the counter-productive effect of preventing it from “maintaining” ship traffic.* The dictionary definitions also suggest the phrase reaches improvement projects. “Maintain” is defined as “to keep in an existing state (as of repair, efficiency or validity):

preserve from failure or decline,” and “navigation” as “ship traffic or commerce.” See Merriam–Webster's Collegiate Dictionary (11th ed. 2005). These are capacious definitions; *preserving “ship traffic” from “failure or decline” could call for a wide range of activities, including repairs, modifications, and improvements.*

685 F.3d at 284 (emphasis added).

In the present context, “preservation” refers to maintaining C-TRAN’s expected levels of service, including current routes and scheduling, in the transit system as a whole. When C-TRAN must replace a bus because it has broken down, C-TRAN need not purchase an exact replica of that bus in order to “preserve” service. Rather, C-TRAN is free to use revenues from the 2005 and 2011 sales tax measures to purchase a more modern bus.

Under appellants’ theory, C-TRAN would be trapped like an insect frozen in amber, unable to use sales tax revenue to purchase items unless they were specifically part of C-TRAN’s system in 2005 or 2011. C-TRAN could never use 2005 or 2011 sales tax measure revenue to update buses with modern GPS equipment for tracking, with modern cameras for passenger and driver safety, or with any other form of modern technology.¹³ Nor could C-TRAN ever add additional bus trips to any of its routes or add additional routes to the C-TRAN system, regardless of whether it was otherwise preserving the pre-existing service. Such an outcome produces an absurd result, contrary to established rules of

¹³ Appellants confirmed during oral argument before Judge Gregerson that this is their position. VRP 22:16–25:1 (stating that C-TRAN could not use the revenues to develop a smartphone application for its riders).

statutory construction. *Fraternal Order of Eagles, Tenino Aerie No. 564 v. Grand Aerie of Fraternal Order of Eagles*, 148 Wn.2d 224, 240, 50 P.3d 655 (2002) (courts should avoid reading statutes in such a way as to “result in unlikely, absurd, or strained consequences.”).

Implementing the BRT Project is no different from replacing an outdated bus or installing new security features on existing buses. Nor does it differ from performing home improvements in *Cook* or deepening the channel in *Delaware Department of Natural Resource & Environmental Control*. The project is necessary to preserve transit service in C-TRAN’s busiest corridor, and it does so in a manner that will greatly reduce costs over years to come. CP 26-27. If C-TRAN does not implement the BRT Project, delays in transit time will continue to grow as traffic increases, thereby furthering a decline in expected service. *Id.* (identifying Fourth Plain boulevard as the highest ridership corridor in Clark County and noting that transit is becoming increasingly overcrowded, unreliable, and delayed). By maintaining and improving C-TRAN riders’ expected level of service, the BRT Project preserves service. *Id.* Moreover, the BRT Project is not expanding current routes, instead consolidating two existing routes into a more efficient option for local fixed-route service. *Id.* The BRT Project provides riders with the service and reliability that the C-TRAN transit system is intended to provide. It addresses the chronic scheduling and overcrowding concerns that plague the Fourth Plain. *Id.* It preserves service.

Because the BRT Project preserves service, it is not a deviation, either minor or substantial, from the 2005 or 2011 Resolutions. C-TRAN may, therefore, appropriately expend revenues from those tax measures for the project.¹⁴

Appellants ignore the concrete ways in which the BRT Project satisfies the purpose of the 2005 and 2011 sales tax measures as demonstrated by the Resolutions and C-TRAN's supporting declarations. Instead, appellants claim that an issue of fact exists, even though there was no dispute before the trial court over the specifications of the BRT Project or how it would be implemented.¹⁵

¹⁴ C-TRAN must be presumed to have acted properly in adopting and implementing the BRT Project. "Until proof to the contrary is shown, it will be assumed that an ordinance was duly passed in entire good faith." 5 Eugene McQuillin, *The Law of Municipal Corporations* § 15:22 at 258 (revised ed. 2013); cf. 56 *Am. Jur. 2d: Municipal Corporations, Etc.* § 594 at 716 (2d ed. 2010) ("[I]n a number of taxpayers' actions to enjoin or prohibit a municipal . . . body . . . from carrying out a contract or proposed improvement, courts have applied or recognized a presumption, which will prevail in the absence of a showing to the contrary, to the general effect that public officials, in incurring an obligation for the public body, act or will act in accordance with the law . . ."). "If stated facts justifying a resolution can be reasonably conceived, such facts should be presumed to exist and the resolution will be presumed to have been passed in conformity with those facts." *Mt. Spokane Skiing Corp. v. Spokane County*, 86 Wn. App. 165, 172, 936 P.2d 1148 (1997).

¹⁵ Appellants argue that the cost of the BRT Project alone suffices to establish that it does not constitute preservation. But cost alone cannot determine whether a project preserves service. For instance, repairing damaged infrastructure after a natural disaster would constitute preservation but could also cost significant sums.

Appellants also argue that the BRT Project is a deviation from the Resolutions because neither Resolution specifically includes the BRT Project. But such specific inclusion is unnecessary, and requiring it here would be inconsistent with this Court's jurisprudence interpreting the use of motor vehicle fund monies. In *Freeman v. Gregoire*, the court upheld the use of tax funds for the administration of highway lands as a "highway purpose" under article II, section 40, because "the expenditure 'indirectly benefits' our public highways." 171 Wn.2d 316, 331, 256 P.3d 264 (2011). The court reaffirmed that a permissible use of the funds could occur even if it "is not specifically spelled out" because "it is, nevertheless, implicitly related to the specific highway purposes delineated in [article II, section 40]." *Id.* at 330-31 (quoting *State ex rel. Wash. State Highway Comm. v. O'Brien*, 83 Wn.2d at 878, 882, 523 P.2d 190 (1974)). Indeed, *O'Brien* recognized that expenditures were for a highway purpose if they "contribut[ed] toward the safety, administration, or operation of the highway system." 83 Wn.2d at 882-83.

Here, even if the Court were to hold that the BRT Project does not specifically preserve service, it should hold that it does so implicitly by contributing to the overall efficiencies in C-TRAN's system. Such a holding would be consistent with this Court's prior rulings in both *Freeman* and *O'Brien*.

2. **The 2005 and 2011 Plans support the goal of preservation and, to the extent they do not, they are mere declarations of principle.**

These Resolutions do refer to plans—the Service Preservation Plan (2005) and the Core Bus and C-VAN Preservation Ballot Measure (2011) (collectively, the “Plans”)—but those Plans, like Sound Move, are “merely declarations of the principles of the plan[, and] . . . are not operative rules of action and do not give rise to enforceable rights or create legal obligations.” *Sane Transit*, 151 Wn.2d at 76. Appellants rely almost entirely on the Plans to argue that tax revenues cannot be spent on the BRT Project. Such arguments are misplaced. They also rely on selective reading.

First, the 2005 Plan focused on preserving service and preventing service reductions. CP 1286 (stating that a major principle of the plan was “**PRESERVING** current transit service levels.” (emphasis in original)). The 2005 Plan assumed that the tax increase would keep C-TRAN’s net reserves in a positive balance until 2011. CP 1287 (assuming “Six-year plan for years 2006 through 2011”); 1295 (financial spreadsheet showing a negative net reserve balance in 2011). Nothing in the plan discussed what C-TRAN would do once the agency ceased facing potential service reductions. Thus, the 2005 Plan showed that the sales tax increase would always be required to prevent decline of the C-TRAN system and that the purpose of the plan was preservation.

Second, the 2011 Plan stated that the proposal was to ask “voters to approve a 0.2 percent sales tax increase . . . in order to preserve existing Fixed Route bus service levels and to meet the anticipated growth of [paratransit service].” CP 1320. Granted, the plan contains one line stating,

“It would provide for minimal capital improvements and replacement of vehicles after running them about 16 years.” CP 1318. But this single statement is a declaration of principle at most, and it is not the binding language of the 2011 Resolution. *See Sane Transit*, 151 Wn.2d at 76. The plan as a whole focuses on projected service eliminations if the 2011 Resolution failed. *See* CP 1315-27.¹⁶

Further, neither plan details the specific ways in which C-TRAN would expend the sales tax revenues generated by the 2005 and 2011 measures in the future. Nor were the plans intended to be such exhaustive transit planning documents. The 2005 and 2011 Plans are each 13-page documents, including appendices, that were designed to show the service reductions that would occur if the tax increases did not pass, rather than exhaustive transit planning documents. In contrast, C-TRAN’s 20-Year Transit Development Plan, which contains C-TRAN’s long range vision, is over 100 pages long. *See* CP 721-856.¹⁷ The purpose behind each of the Resolutions was to prevent further reduction in service caused by insufficient funding and to preserve and restore service levels. *See* CP

¹⁶ Similarly, the flyer C-TRAN distributed to voters in accordance with the 2011 Resolution focused primarily on the service reductions. CP 1333-34 (summarizing the service reductions and explaining that the tax increase was necessary to prevent them).

¹⁷ The 2011 Plan states that it will fund two phases of the 20-Year Transit Development Plan. CP 1315. Thus, the language used in the 2011 Plan shows that it was neither contrary to the long-term development plan nor intended to replace it.

1310-11, 458. The Plans support this purpose. See CP 1285-87 (discussing the financial hardship facing C-TRAN); 1315-18 (same).

Regardless, even if appellants were correct that the BRT Project runs contrary to the 2005 Plan and the 2011 Plan, the Plans do not actually create enforceable rights. In *Sane Transit*, this Court held that plans referenced in resolutions presented to voters, such as the plans at issue here, are “merely declarations of the principles of the [resolution][, and] [d]eclarations of principles, purposes, and aims are not operative rules of action and do not give rise to enforceable rights or create legal obligations.” 151 Wn.2d at 76. Thus, appellants’ reliance on the Plans to argue that the BRT Project is unauthorized fails for reasons this Court already addressed in *Sane Transit*.

C. Appellants Lack Standing to Challenge Discretionary Decisions, Because They Have Not Alleged Special Injury.

To the extent appellants dispute C-TRAN’s decision that the BRT Project is the best method of preserving service in the Fourth Plain, plaintiffs lack standing to challenge that discretionary decision because they have not alleged any special injury. See *Friends of N. Spokane County Parks v. Spokane County*, 184 Wn. App. 105, 336 P.3d 632, 638 (2014) (challenges to discretionary decisions require a special injury). The wisdom of the BRT Project is not before this Court; the only question is whether it is a lawful project. Cf. *Louthan v. King County*, 94 Wn.2d 422, 427, 617 P.2d 977 (1980) (“The wisdom of the King County plan is not for the consideration of this court—its constitutionality is.”). Courts

defer to a legislative body when determining whether an expenditure serves a required purpose. *See CLEAN v. City of Spokane*, 133 Wn.2d 455 at 467, 947 P.2d 1169 (1997) (“Where it is debatable as to whether or not an expenditure is for a public purpose, we will defer to the judgment of the legislature.”) (internal quotation omitted). Thus, the discretionary issue of whether the BRT Project is the best method of preserving service is not before this Court. The only question is whether it preserves service as a general matter, and it does.

D. C-TRAN May Also Utilize the 2005 and 2011 Sales Tax Measure Revenue on the BRT Project Because C-TRAN Is Otherwise Preserving Service.

The Court may affirm the trial court under an alternative theory—namely, that the Resolutions do not prohibit the use of sales tax revenues for any projects so long as the stated goal of preservation is satisfied. Because appellants did not allege that C-TRAN is failing to preserve service (*see* CP 1-9), the Court must presume that C-TRAN is meeting its preservation obligations.

Although the 2005 and 2011 Resolutions were passed to prevent reductions in service, they do not specifically prohibit the use of revenues for additional projects if excess funding is available. The Resolutions were presented to voters at a time when C-TRAN lacked the financial ability to expand any of its services, even with the sales tax increases. The materials provided to voters and the discussion in the Resolutions make this possible reduction in service clear. The Resolutions were intended to

preserve service by preventing such reductions¹⁸, and that goal is being met. See CP 458 (“The C-TRAN Board of Directors determined that 0.2 percent sales and use tax increase will preserve C-TRAN’s existing local fixed route. . . .”), 1310 (authorizing a 0.2 percent sales and use tax “for the purpose of funding C-TRAN’s Service Preservation Plan, which preserves current service levels . . .”). Consequently, C-TRAN is free to use any revenues in excess of those necessary for preservation for additional projects.

Under appellants’ theory, once C-TRAN has met its obligation of preserving service, C-TRAN may not use the excess revenue for any purpose whatsoever. Nothing in the Resolutions stated that C-TRAN would place revenues that exceed the cost of preservation into a special fund or otherwise dispose of them. Accordingly, C-TRAN may use the 2005 and 2011 sales tax measure revenues on the BRT Project—even assuming *arguendo* that the project expands rather than preserves service—because C-TRAN is otherwise preventing service reductions.

E. Appellants Are Not Entitled to Attorneys’ Fees.

Appellants’ request for attorneys’ fees under RAP 18.21(b) and the common-fund rule should be denied. The common-fund rule allows a

¹⁸ The Plans illustrate the same purpose. CP 1286 (explaining that a service reduction plan would be implemented to “reduce transit service by 46 percent and eliminate up to 164 staff positions”); CP 1318 (“Should C-TRAN’s Core Bus Preservation ballot measure not be approved, significant reductions in service would need to be implemented no later than late 2012/early 2013.”).

plaintiff to recover attorneys' fees where the plaintiff's actions "created a specific monetary fund *and* conferred a substantial benefit on an ascertainable class." *Parrell-Sisters MHC, LLC v. Spokane County*, 147 Wn. App. 356, 195 P.3d 573 (2008) (citing *Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995)) (emphasis in original). In *Covell*, the court awarded attorneys' fees to two plaintiffs who brought an action "individually and as representatives of the class of persons similarly situated." 127 Wn.2d at 876. The court reasoned that the litigants "sought and obtained a refund of street utility charges paid by Seattle residents [and thereby] created a specific monetary fund *and* conferred a substantial benefit on an ascertainable class." *Id.* at 892 (emphasis in original). In contrast, the court in *Parrell-Sisters* refused to award attorneys' fees because "[plaintiff] did not file th[e] lawsuit as a class action and there [was] no fund created or preserved for the common benefit of others." 147 Wn. App. at 363.

Here, appellants neither brought this action as a class action nor sought a return of any funds.¹⁹ Unlike the refund at issue in *Covell*, appellants are not requesting a return of moneys spent on the BRT but only a declaration that such expenditures were improper. *See* CP 8. Further, even if this Court were to reverse the trial court's ruling, appellants would not be entitled to recover fees expended in this case.

¹⁹ Further undercutting their request for fees is the fact that appellants have yet to establish that C-TRAN is actually using revenue from the 2005 and 2011 sales tax measures on the BRT Project.

Appellants are appealing the dismissal of only one of the many claims they brought against C-TRAN. They implicitly acknowledge that the other claims were properly dismissed.

VI. CONCLUSION

The 2005 and 2011 Resolutions authorize C-TRAN to use the sales tax revenues on the BRT Project because that project preserves service. Even if the BRT Project represents expansion rather than preservation of service, use of the sales tax revenues on that project is consistent with the 2005 and 2011 Resolutions because C-TRAN is otherwise meeting its preservation obligations. Accordingly, Judge Gregerson's summary judgment order should be affirmed.

Respectfully submitted this 21st day of December, 2015.

K&L GATES LLP

By 

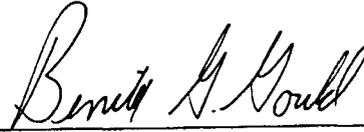
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DECLARATION OF SERVICE

I declare under penalty of perjury under the laws of the State of Washington that, on the date below, I served a copy of the foregoing document by email, per agreement of the parties, to:

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Signed this 22nd day of December, 2015, at Seattle, King County, Washington.



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Attached is the Brief of Respondent



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