

RECEIVED
SUPREME COURT
STATE OF WASHINGTON
Jun 04, 2014, 9:35 am
BY RONALD R. CARPENTER
CLERK

No. 89723-9

RECEIVED BY E-MAIL

SUPREME COURT OF THE STATE OF WASHINGTON

BF FOODS, LLC; FILO FOODS, LLC, ALASKA
AIRLINES, INC., and WASHINGTON RESTAURANT
ASSOCIATION,

Respondents/Cross-Appellants,

v.

CITY OF SEATAC, KRISTINA GREGG, CITY OF
SEATAC CITY CLERK,

Appellants/Respondents.

and

PORT OF SEATTLE,
Respondent,

and

SEATAC COMMITTEE FOR GOOD JOBS,
Appellant/Cross-Respondent.

**ANSWER OF CITY OF SEATAC AND KRISTINA
GREGG, CITY CLERK TO AMICUS MASTERPARK**

For City of SeaTac and Kristina Gregg
Wayne D. Tanaka, WSBA #6303
OGDEN MURPHY WALLACE, P.L.L.C.
901 Fifth Avenue, Suite 3500
Seattle WA 98164-2008 - 206-447-7000

{WDT1172568.DOCX;1/13098.000002/ }

 ORIGINAL

TABLE OF CONTENTS

- I. INTRODUCTION1
- II. THE BURDEN OF PROOF2
- III. ARGUMENT2
 - A. The challenges to the Ordinance are “as applied” rather than “facial”.2
 - B. The effect of the severability clause.3
 - C. Provisions of the Ordinance are severable.3
 - D. There was no “legislative compromise”.6
- IV. CONCLUSION7

TABLE OF AUTHORITIES

CASES

	<i>Page</i>
Gerberding v. Munroe, 134 Wn.2d 188, 949 P.2d 1366 (1998).....	4
Hall v. Niemer, 97 Wn.2d 574, 649 P.2d 98 (1982).....	5
Leonard v. City of Spokane, 127 Wn.2d 194, 827 P.2d 358 (1995).....	5
Mount Hood Beverage Co. v. Constellation Brands Inc. 149 Wn.2d 98, 63 P.3d 779 (2003).....	3
Redmond v. Moore, 151 Wn.2d 664, 91 P.3d 875 (2004).....	2
State v. Harris, 123 Wash. App. 906, 918, 99 P.3d 902 (2004).....	2
Thorsted v. Munro, 75 F.3d 454 (9th Circuit, 1998)	4

STATUTES

RCW 39.88	5
RCW 39.88.070	5

OTHER AUTHORITIES

Community Redevelopment Funding Act of 1982	5
---	---

I. INTRODUCTION

The City of SeaTac, Washington (the “City”) and the City Clerk, Kristina Gregg (collectively the “City Appellants”) submit this brief in answer to Amicus Curiae Masterpark LLC. (“Masterpark”)

This appeal involves an ordinance adopted by the voters of SeaTac which imposes certain labor standards for certain workers of certain employees in the City of SeaTac (“the Ordinance”).¹ The Ordinance was promoted by the Intervenor, SeaTac Committee for Good Jobs (“the Committee”). BF Foods, LLC, Filo Foods, LLC, Alaska Airlines, Inc. and Washington Restaurant Association (“Plaintiffs”) and the Port of Seattle (“Port”) have challenged the validity of the Ordinance, especially as the Ordinance applies to businesses at Seattle-Tacoma Airport (“the Airport”). Masterpark argues that the provisions of the Ordinance are not severable. Masterpark’s analysis is incomplete and incorrect.

Masterpark’s brief addresses the issue of severability of the Ordinance, but only from the perspective of whether the Ordinance is applicable at the Airport.

¹ CP 98-119.
{WDT1172568.DOCX;1/13098.000002/ }

II. THE BURDEN OF PROOF

Statutes are presumed severable, and the party challenging the validity of the statute has the burden of proof to demonstrate that the statute is void.²

III. ARGUMENT

A. The challenges to the Ordinance are “as applied” rather than “facial”.

Challenges to the validity of a statute come in two varieties, “as applied” and “facial”. In the former, the plaintiff alleges that application of the statute in the specific context of the plaintiff is invalid. In a facial challenge, the plaintiff must show that there are no circumstances where the statute can be legally applied. A court’s finding that a statute is invalid as applied means that the statute cannot be applied in all similar contexts, but the entire statute is not invalidated. In contrast, finding a facial invalidity means the entire statute is struck down. *Redmond v. Moore*, 151 Wn.2d 664, 91 P.3d 875 (2004). In this case the challenges to the Ordinance’s effect on the businesses located at the Airport is an “as applied” challenge.³ Therefore even if this Court were to hold that precluded the Ordinance from application at the Airport, there is no basis for holding that the Ordinance in its entirety is invalid. A severability

² State v. Harris, 123 Wash. App. 906, 918, 99 P.3d 902 (2004)

³ Filo Foods, BF Foods and Alaska Airlines all operate at the Airport.
{ WDT1172568.DOCX;1/13098.000002/ }

analysis is not warranted since there is no specific provision of the Ordinance that has been ruled invalid--only its application to certain businesses.⁴ The remainder of this brief is relevant only if the Court determines that a severability analysis is warranted.

B. The effect of the severability clause.

The Ordinance has a severability clause. This clause establishes that the voters would have enacted the remaining portions of the Ordinance if a court were to find that some provisions are invalid or are inapplicable to certain businesses. While this severance clause is not binding on a court, it nevertheless establishes the legislative intent.⁵

C. Provisions of the Ordinance are severable.

In this case, the Plaintiffs and Port argue that the Ordinance is invalid, as applied to businesses at the Airport.⁶ This is not a case where portions of a statute are declared invalid entirely. Put another way, the alleged invalidity of the Ordinance relates only to certain businesses based on location.

⁴ Masterpark's brief only addressed the issue of whether the Ordinance was applicable to businesses at the Airport. The Plaintiffs have raised certain federal law issues that may or may not require specific sections of the Ordinance to be invalidated. In such a case a severability analysis would have to be made. Since Masterpark did not address these federal law issues in its brief, the City Appellants will not either.

⁵ *Mount Hood Beverage Co. v. Constellation Brands Inc.* 149 Wn.2d 98, 63 P.3d 779 (2003)

⁶ Plaintiffs also argue that the Ordinance is invalid in its entirety for a number of reasons. Obviously a severability analysis would not apply if the Court were to accept these arguments.

{WDT1172568.DOCX;1/13098.000002/ }

In *Gerberding v. Munroe*, 134 Wn.2d 188, 949 P.2d 1366 (1998) a challenge was brought against Initiative 573 which purported to impose term limits on state and federal officeholders.⁷ The law's effect on federal officeholders had been previously found unconstitutional in a prior federal case.⁸ The issue then arose as to severability. As in this case the challengers pointed to statements in the voters' pamphlet:

[P]etitioners assert the elimination of the unconstitutional portions of Initiative 573 pertaining to federal legislators so destroys the act as to render it incapable of accomplishing its intended purpose. They note the frequent references in the 1992 Voters' Pamphlet to "national issues" as to the intent of Initiative 573, claiming the term limits for federal legislators were essential to its enactment by the people. The 1992 Voters' Pamphlet refers to the national debt and tax burden, the S & L bailout and congressional banking and postal scandals.⁹

Despite the "frequent" references to national issues, the Court had no problem severing the state elective offices from the federal offices since the stated goal of eliminating the supposed evils of incumbency and "deadwood" could equally apply to state officeholders as national ones.

⁷ The initiative was part of a national campaign for term limits and other provisions being promoted at the time by a major national party.

⁸ *Thorsted v. Munro*, 75 F.3d 454 (9th Circuit, 1998)

⁹ *Gerberding* at 197-198.

{WDT1172568.DOCX;1/13098.000002/ }

The facts in this case are distinguishable from the facts in the *Leonard v. City of Spokane* case¹⁰ relied upon by Masterpark. That case involved a challenge to the Community Redevelopment Funding Act of 1982 (RCW 39.88) (“Act”). The Act allowed cities to finance public improvements through issuance of bonds backed by existing property tax revenues. Plaintiff alleged that the funding section of the Act, RCW 39.88.070 was unconstitutional because it allowed a portion of the property tax constitutionally allocated to public schools to be diverted to funding public improvements. The Court agreed. As to severability, the Court concluded that because RCW 39.88.070 as the funding mechanism was the “heart and soul” of the Act, the other sections would be worthless without it.¹¹ The facts in this case are entirely different since the provisions of the Ordinance are not dependent upon the Ordinance’s applicability at the Airport. The provisions of the Ordinance will work perfectly well in other areas of SeaTac.

Similarly the facts in *Hall v. Niemer*, 97 Wn.2d 574, 649 P.2d 98 (1982) ¹²are distinguishable. There the Court invalidated provisions in various statutes that imposed a requirement that tort victims file a claim

¹⁰ 127 Wn.2d 194, 897 P.2d 358 (1995)

¹¹ *Leonard* at 201-202

¹² 97 Wn.2d 574, 649 P.2d 98 (1982)
{WDT1172568.DOCX;1/13098.000002/ }

with governmental entities within 120 days of the injury. The statutes contained other procedural requirements which the Court indicated would pass constitutional muster. However since the invalid 120 day requirement was “intimately connected” with the remaining valid provisions, the entire law was struck down. As indicated above, in this case the alleged invalidity of the Ordinance relates not to specific provisions, but its application to certain businesses. There is no “intimate connection” in this case.

D. There was no “legislative compromise”.

Masterpark devotes about half its brief to a discussion of “legislative compromise”.¹³ The City Appellants were not able to discern just what this compromise is or was supposed to be. Nevertheless, it appears that Masterpark believes that the Ordinance, as written, was intended to mainly apply at the Airport and provide a “level playing field” for other businesses, like Masterpark, who are subject to the Ordinance but are not located at the Airport. After the superior court’s ruling, this playing field is no longer level in that Masterpark is somehow at a competitive disadvantage. Assuming without conceding that this is true, Masterpark’s analysis still fails.

¹³ Brief of Masterpark, pages 9-14
{WDT1172568.DOCX;1/13098.000002/ }

While it is uncontested that the Ordinance was intended to apply to businesses that operated at the Airport, there is zero evidence that the voters would have rejected the Ordinance if they knew it would not apply there. While a majority of the covered employees work at the Airport (and thus the bulk of the costs would be borne by “big overseas and multinational corporations”), a significant portion of the covered employees and their employers do not work at the Airport. . Illustrative of this point is the fact that the Ordinance was also written to specifically apply to the hospitality industry. This includes larger hotels, none of which are located at the airport. There is simply no evidence or reason why this Court should assume that the voters would not have accepted “half a loaf” and voted for the Ordinance even if they knew it would not apply at the Airport.

IV. CONCLUSION

The City Appellants request this Court to find the provisions of the Ordinance applicable to businesses located other than at the Airport to be valid and severable from the balance of the Ordinance.

RESPECTFULLY SUBMITTED this 4th day of June, 2014.

OGDEN MURPHY WALLACE, P.L.L.C.

By /s/ Wayne D. Tanaka
Wayne D. Tanaka, WSBA #6303
For Respondents/Cross-Appellants

DECLARATION OF SERVICE

I, Gloria Zak, make the following true statement:

On the 4th day of June, 2014, I provided a copy of this document to the following via email and regular mail:

COUNSEL FOR FILO FOODS AND BF FOODS:

Cecilia A. Cordova, Cecilia@cordovalawfirm.com
PACIFIC ALLIANCE LAW, PLLC
601 Union St., Suite 4200
Seattle WA 98101-4036

FOR ALASKA AIRLINES WA RESTAURANT ASSN.:

Harry J. F. Korrell, harrykorrell@dwt.com
Donna L. Alexander, (secretary) donnaalexander@dwt.com
Herman L. Wacker, herman.wacker@alaskaair.com
Taylor Ball, WSBA, taylorball@dwt.com
Roger A. Leishman, rogerleishman@dwt.com
DAVIS WRIGHT TREMAINE
1201 Third Avenue, Suite 2200
Seattle WA 98101-3045

INTERVENOR SEATAC COMMITTEE FOR GOOD JOBS:

Dmitri Iglitzin, iglitzin@workerlaw.com
Laura Ewan, ewan@workerlaw.com
Bess McKinney, mckinney@workerlaw.com
SCHWERIN CAMPBELL BERNARD IGLITZIN
18 W. Mercer St., Suite 400
Seattle WA 98119-3971

CITY OF SEATAC:

Mary Mirante Bartolo, mmbartolo@ci.seatac.wa.us
Mark Johnsen, mjohnsen@ci.seatac.wa.us
City of SeaTac's Attorney's Office
4800 South 188th Street
SeaTac WA 98188-8605

PORT OF SEATTLE:

Shane P. Cramer, shane@calfoharrigan.com
Tim Leyh, timl@calfoharrigan.com
CALFO HARRIGAN LEYH & EAKES
999 Third Avenue, Suite 4400
Seattle WA 98104

FOR AMICUS, WA PUBLIC PORTS ASSN (WPPA)

Christopher H. Howard, choward@schwabe.com
Averil Rothrock, arothrock@schwabe.com
Virginia R. Nicholson, vnicholson@schwabe.com
SCHWABE WILLIAMSON & WYATT
1420 5th Avenue, Suite 3400
Seattle WA 98101

WASHINGTON PUBLIC PORTS ASSOCIATION

Frank J. Chmelik, fchmelik@chmelik.com
Seth A. Woolson, swoolson@chmelik.com
CHMELIK SITKIN & DAVIS
1500 Railroad Avenue
Bellingham WA 98225

FOR MASTERPARK

Patrick D. McVey, pmevey@riddellwilliams.com
James E. Breitenbucher, jbreitenbucher@riddellwilliams.com
RIDDELL WILLIAMS
1001 Fourth Avenue Suite 4500
Seattle WA 98154

FOR ASSN OF WASHINGTON BUSINESS

Timothy J. O'Connell, tjoconnell@stoel.com
STOEL RIVES LLP
600 University St., Suite 3600
Seattle WA 98101

And

Kristopher I. Tefft, kris.tefft@wsiassn.org
1401 Fourth Avenue East, Suite 200
Olympia WA 98506-4484

FOR ATTORNEY GENERAL

Robert W. Ferguson, AG, judyg@atg.wa.gov
Noah Guzzo Purcell, Solicitor Gen.
PO Box 40100
Olympia WA 98504-0100

LIMITED ADMISSION - AIRLINES FOR AMERICA

Robert J. Guite, rguite@sheppardmullin.com
SHEPPARD MULLIN RICHTER & HAMPTON
Four Embarcadero Center, 17th Floor
San Francisco CA 94111

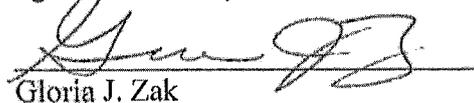
LIMITED ADMISSION - AIRLINES FOR AMERICA

M. Roy Goldberg, rgoldberg@sheppardmullin.com
SHEPPARD MULLIN RICHTER & HAMPTON
1300 I Street NW, 11th Floor East
Washington DC 20005

Douglas W. Hall, dhall@fordharrison.com
FORD HARRISON
1300 19th Street NW Suite 300
Washington DC 20036

I declare under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

EXECUTED at Seattle Washington this 4th day of June, 2014.


Gloria J. Zak

OFFICE RECEPTIONIST, CLERK

From: OFFICE RECEPTIONIST, CLERK
Sent: Wednesday, June 04, 2014 9:36 AM
To: 'Gloria J. Zak'; Averil Rothrock; Bess McKinney; Cecilia Cordova; Christopher Howard; Dmitri Iglitzin; Donna Alexander; Douglas Hall; Frank Chmelik; Harry Korrell; Herman Wacker; James Breitenbucher ; Jennifer Robbins; Kristopher Tefft; Laura Ewan; M. Roy Goldberg; Mar Mirante Bartolo; Mark Johnsen; Patrick McVey; Robert Gerguson; Robert Guite; Roger Leishman; Seth Woolson; Shane Cramer; Taylor Ball; Tim Leyh; Timothy O'Connell; Virginia Nicholson
Cc: Wayne D. Tanaka
Subject: RE: BF FOODS ET AL V. SEATAC, ET AL - Case No. 89723-9

Rec'd 6-4-14

Please note that any pleading filed as an attachment to e-mail will be treated as the original. Therefore, if a filing is by e-mail attachment, it is not necessary to mail to the court the original of the document.

From: Gloria J. Zak [mailto:gzak@omwlaw.com]
Sent: Wednesday, June 04, 2014 9:29 AM
To: OFFICE RECEPTIONIST, CLERK; Averil Rothrock; Bess McKinney; Cecilia Cordova; Christopher Howard; Dmitri Iglitzin; Donna Alexander; Douglas Hall; Frank Chmelik; Harry Korrell; Herman Wacker; James Breitenbucher ; Jennifer Robbins; Kristopher Tefft; Laura Ewan; M. Roy Goldberg; Mar Mirante Bartolo; Mark Johnsen; Patrick McVey; Robert Gerguson; Robert Guite; Roger Leishman; Seth Woolson; Shane Cramer; Taylor Ball; Tim Leyh; Timothy O'Connell; Virginia Nicholson
Cc: Wayne D. Tanaka
Subject: BF FOODS ET AL V. SEATAC, ET AL - Case No. 89723-9

Attached is the following:
Answer of City of SeaTac and Kristina Gregg to Amicus Washington Public Ports Association; and
Answer of City of SeaTac and Kristina Gregg to Amicus Masterpark

Hard copies follow via regular mail to counsel only.

Gloria Zak, LA to Wayne D. Tanaka

Gloria J. Zak | Municipal Legal Assistant

Ogden Murphy Wallace P.L.L.C.
901 Fifth Avenue, Suite 3500 Seattle, WA 98164
phone: 206.447.7000 | fax: 206.447.0215
gzak@omwlaw.com | omwlaw.com

CONFIDENTIAL COMMUNICATION – This communication constitutes an electronic communication within the meaning of the Electronic Communications Privacy Act, 18 U.S.C. Section 2510, and its disclosure is strictly limited to the recipient intended by the sender. It may contain information that is proprietary, privileged, and/or confidential. If you are not the intended recipient, any disclosure, copying, distribution, or use of any of the contents is STRICTLY PROHIBITED. If you have received this message in error, please notify the sender immediately and destroy the original transmission and all copies.