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Wise Use of Tax Money Recommended

Article VII § 5 of the Washington Constitution specifically states that "every *law* imposing a tax shall state distinctly the object of the same *to which only it shall be applied*." (emphasis added). This generally means that when a governing body resolves to levy a tax, or expend a levied tax in a particular manner, the governing body should not veer from any resolution—or resolutions—imposing that tax. For purposes of this article, assume that a resolution of a governing body to impose a tax measure is a "law" subject to Article VII § 5 (as was held in the case below).

Recently, in *C-Tran*, No. 48715-2-II (2016), the Court of Appeals utilized principles of statutory interpretation to hold that a governing body's expenditures of particular tax funds were constitutional under Article VII § 5. The facts of this case are important. In *C-Tran*, the governing body of a transit authority—C-TRAN—passed two resolutions proposing tax measures in 2005 and 2011. Voters passed both of those ballot measures. In 2012, the C-TRAN board decided to allocate funds from the 2005 and 2011 measures to fund a $53 million dollar project to improve bus service in a particular service corridor. Taxpayers challenged this allocation under Article VII § 5, finding that those two measures were not drawn broadly enough to permit such a deviation from the original resolutions. The trial court dismissed the taxpayers' claims.

The Court of Appeals affirmed the trial court, and held that "C-TRAN can lawfully use the

revenue from the 2005 and 2011 ballot measures to fund the [transit improvement] project because that project is consistent with the goals of the tax measures as stated in the enabling resolutions – *to preserve local transit service*." (emphasis added).

2005 Measure

The language of this resolution: C-TRAN resolved to impose "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* and restores innovative services to areas that lost service in 2000." (emphasis added). The resolution also asked the auditor to include specific ballot language, setting forth that the reason for the additional tax was "to *preserve* C-TRAN local fixed route, commuter, and demand response service." (emphasis added).

2011 Measure

The language of this resolution: C-TRAN resolved to impose "an additional 0.2 percent of the sales and use tax available to [C-TRAN] for the purpose of funding a Core Bus and C-Van Preservation Ballot Measure." (in other words, this resolution had a much more specific purpose than the 2005 resolution). Furthermore, C-TRAN asked for the same language as that included in the 2005 measure: "to *preserve* C-TRAN local fixed route, limited, commuter and Connector service." (emphasis added).

2012 Project

This $53 Million expenditure would pay for 10 new buses, better wheelchair accessibility to buses, and route additions, including a slew of other improvements to the C-TRAN service area.

Essentially, the taxpayers argued that the specific purpose of the original resolutions was to fund the "Preservation Plan" of C-TRAN—which was a specific project—and C-TRAN argued that the intent of the original resolutions was to preserve current service levels in general.

The Court's Holding

The Court of Appeals found that the original 2005 and 2011 resolutions were the "law" subject to Article VII § 5. The court also analyzed another court case finding that a resolution—not an explanatory statement, ballot measure, or voters' pamphlet—is the appropriate document that should be utilized in discerning how a particular tax measure was intended to be utilized by a governing body. The court applied principles of statutory construction to hold that C-TRAN did not veer far enough from the 2005 and 2011 resolutions to violate Article VII § 5. That is because, the court held, the resolutions were meant to uphold the Preservation Plan and the overall goal of that plan was to preserve service levels. The 2012 expenditure fell within that goal, the court held.

Governing Law

Washington courts interpret resolutions of a local governing body in the same way that the courts would interpret a state statute. The purpose of statutory interpretation is to determine and give effect to the enacting body's **intent**. *Gray v. Suttell & Assocs.*, 181 Wn.2d 329, 339, 334 P.3d 14 (2014). To determine the intent behind a resolution, the courts first look to the plain language of the resolution, considering the text of the resolution, the context of the resolution, and related resolutions. *Id.*

Under Article VII § 5, an expenditure is unconstitutional if it diverts taxes assessed for purposes stated in a resolution into some "wholly unrelated project or fund." *Sheehan v. Cent. Puget Sound Reg'l Transit Auth.*, 155 Wn.2d 790, 804, 123 P.3d 88 (2005). Of course, "[W]hen voters approve taxes for a public project, major deviations to the project are not within the government's lawful power." *Larson v. Seattle Popular Monorail Auth.*, 156 Wn.2d 752, 765, 131 P.3d 892 (2006). However, a substantial deviation from the proposed tax measure is lawful if the enabling legislation for the measure authorizes such a deviation. *See Id.*

In other words, when resolving to levy a tax, be certain that your agency specifies—in broad terms—the reasons for which the revenues from that levy may be utilized. Otherwise, if your agency wished to veer ever-so-slightly from the specific intent for which the resolution was enacted, you may face a lawsuit under Article VII § 5.

The Court's Reasoning

Most importantly, the *C-Tran* court found, the resolutions both stated that the purpose of each was to *preserve* service levels. The fact that these measures were specifically designed for the C-TRAN "Preservation Plan"—a specific project—was irrelevant: the word "preserve" was all-important in *C-Tran.* Ultimately, the court interpreted "the 2005 resolution to give effect to both its specific purpose, to fund the Service Preservation Plan, and its broader goal, to preserve current transit service levels."

What may be drawn from *C-Tran*? First, Washington courts will interpret resolutions as a whole—including the circumstances surrounding the making of those resolutions—to discern the intent of those resolutions. And second, Washington courts will permit deviations—which are not substantial and wholly different than the purposes for which the resolutions were passed—when the general purpose of the resolution is fulfilled by the expenditure. Consequently, a governing body must ensure that any expenditure from funds derived from particular ballot measures comports with the intent of the resolutions seeking the ballot measures. Certainly, expenditures designed to *preserve* the current levels of service will be construed broadly, in favor of the agency, as was the case in *C-Tran.*

When Does an Employee Have a Right Not to Be Associated with a Union?

Under RCW 41.56.122, when public employees seek to certify as a bargaining unit, an employee who desires not to be a part of that bargaining unit—who would logically be included in that unit—may not simply say "count me out." In fact, this statute requires that an employee may only assert a right of "nonassociation" based on "bona fide religious tenets or teachings of a church or religious body of which such public employee is a member."

This is a well-settled principle in Washington law, but at times, this bears repeating. *See Local 519*, DECISION 5595 - PECB (1996) (employee found to be member of Seventh Day Adventist church entitled to non-association but must pay dues to charity). Under the Washington Administrative Code, the employee asserting a right of nonassociation must demonstrate not only a bona fide religious belief, but must also demonstrate "[T]hat the religious nature of the *objection* is genuine and

in good faith." *See* WAC 391-95-230 (emphasis added). In other words, the employee must not only show that they have a sincere religious belief, but must also demonstrate that they object to union membership *on the basis* of that religious belief.

Of course, an employee who succeeds in asserting a right of nonassociation "shall pay an amount equivalent to regular union dues and initiation fee to a nonreligious charity" or to a charitable organization which the union and employee *mutually agree upon* (i.e. in a union security provision). *See* RCW 41.56.122.

Remember the First Amendment on Social Media

Recently, the Court of Appeals for the Fourth Circuit, in *Liverman v. City of Petersburg,* No. 15-2207 (2016), found the social media policy of a police department unconstitutionally overbroad in violation of the First Amendment. The "central provision" of the policy read as follows:

> "Negative comments on the internal operations of the Bureau, or specific conduct of supervisors or peers that impacts the public's perception of the department is not protected by the First Amendment free speech clause, in accordance with established case law."

In *Liverman,* some officers took to Facebook and lampooned the promotional policies of the department, making statements such as "[Y]our Agency is only as good as it's Leader(s)... It's hard to 'lead by example' when there isn't one."

The two officers were given an oral reprimand and refused promotional opportunities, because their chief found they had violated the social media policy. The court reversed the discipline.

Ultimately, the framework for a free-speech-in-public-employment case is as follows:

"Courts begin the First Amendment inquiry by assessing whether the speech at issue relates to a matter of public concern. *See Pickering,* 391 U.S. at 568. If speech is purely personal, it is not protected and the inquiry is at an end. If, however, the speech is of public concern, courts must balance 'the interests of the [employee], as a citizen, in commenting upon matters of public concern and the interest of the State, as an employer, in promoting the efficiency of the public services it performs through its employees.' *Id.*; *see also Connick,* 461 U.S. at 142." *See Liverman.*

In *Liverman,* the court found that the scale tipped in favor of the employee: The speech related more to a matter of public concern (the behavior of leaders and the promotional process) than the speech was "purely personal." Ultimately, the *Liverman* court reasoned, "[W]hat matters to the First Amendment analysis is not only the medium of the speech, but the scope and content of the restriction."

Oh, yes: Happy New Year from the Firehouse Lawyer.