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**IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING**

PIERCE COUNTY, a local government in the State of Washington, GLORIA IRENE THEIN, a resident of Pierce County, CITY OF TACOMA, a local government in the State of Washington, WILLIAM LaBORDE, a resident of Tacoma, KING COUNTY, a local government in the State of Washington, KAREN UFFELLMAN, a King County resident,

Plaintiffs,

and,

CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY, THE SIERRA CLUB, 1000 FRIENDS OF WASHINGTON, KING COUNTY LABOR COUNCIL, WASHINGTON STATE LABOR COUNCIL, CITY OF KENMORE, TRANSPORTATION CHOICES COALITION, AMALGAMATED TRANSIT UNION LOCAL 587, and AEROSPACE MACHINIST UNION,

Intervenors Plaintiffs,

v.

STATE OF WASHINGTON,

Defendant,

and

SALISH VILLAGE HOME OWNERS ASSOCIATION, a Washington non-profit association, G. DENNIS VAUGHN, a citizen and taxpayer resident of King County, and PERMANENT OFFENSE,

Intervenor Defendants.

*Honorable Mary Yu
Motion set without oral argument
for Thursday, November 23, 2004*

Cause No. 02-2-35125-5 SEA

INTERVENOR DEFENDANTS':

(1) MOTION FOR CLARIFICATION
OF SUMMARY JUDGMENT ORDER;

and

(2) MOTION FOR RECONSIDERATION.

1 COME NOW Intervenor Defendants Salish Village Home Owners
2 Association, Mr. G. Dennis Vaughan, and Permanent Offense who hereby:

- 3 (1) move the Court pursuant to CR 7(b) and KCLR 7 for an Order **Clarifying** the Court's
4 November 5, 2004 ORDER GRANTING/DENYING MOTIONS FOR PARTIAL
5 SUMMARY JUDGMENT; and
6 (2) move the Court pursuant to CR 59 to **Reconsider** its November 5, 2004 ORDER
7 GRANTING/DENYING MOTIONS FOR PARTIAL SUMMARY JUDGMENT,
8 for the reasons set forth below.

9 I. MOTION TO CLARIFY COURT'S RULING

10 A. BACKGROUND: The Court's November 5, 2004 Order denied Intervenor Defendants'
11 Motion for Partial Summary Judgment and granted Sound Transit's Motion for Partial Summary
12 Judgment.

13 B. RELIEF REQUESTED: The issues needing clarification related to what the Court
14 intended by this CR 56 Order. These questions are:

- 15 (1) Did the Court intend to enter a CR 56(d) Order upon the whole case for all the relief
16 sought in the two cross-motions for partial summary judgment pleadings?
17 (2) Did the Court intend to enter an interlocutory partial CR 56(d) Order upon some — but
18 not all — claims, with remaining claims to be adjudicated at trial, but with no final
19 judgment yet being entered in the case?
20 (3) Did the Court intend to enter an interlocutory CR 56(d) Order upon some — but not all
21 — claims, with remaining claims to be adjudicated at trial, but intending to enter a CR
22 54(b) final judgment on the adjudicated claims, with appropriate findings for no just
23 delay, such that RAP 2.2(d) appeal provisions apply?
24 (4) If the Court intended an Order described in Questions Number (2) or (3) above, what does
25 the Court ascertain to be material facts existing without substantial controversy justify-
26 ing its decision, and what material facts are actually controverted and left to be
27 ascertained at trial? and
28 (5) If the Court intended an Order described in Question Number (1) above, does the Court
intend to enter a CR 54 judgment with future entry pursuant to CR 58, or does the Court
consider its November 5, 2004 "Order Granting/Denying Motions For Partial Summary
Judgment" as the final judgment in the case?

1 C. ARGUMENT AND AUTHORITY RELIED UPON:

2 CR 54 distinguishes between Judgments, which do trigger appeal periods, and Orders,
3 which do not. The Court’s November 5, 2004 Order is denominated as an “Order,” and not a
4 “Judgment.” It appears that a judgment must be entered, and it is not clear from the Court’s
5 Order whether that will be a final judgment disposing of all claims and defenses, or whether it
6 will be a final judgment on some — but not all — claims, or whether no final judgment of any
7 kind is presently intended by the Court.

8 The parties need clarification of the intended reach and scope of the Court’s November
9 5, 2004 Order because it is not possible with the current status of this case to know if immediate
10 appeal periods have been triggered on some or all claims and/or, if a trial is to be held as
11 scheduled on December 13, 2004. Nor is it possible for the parties to know what claims and
12 factual disputes exist to be adjudicated at trial.

13 If the Court’s Order on Partial Summary Judgment motions is intended as a final
14 judgment disposing of some — but not all — claims and factual disputes, it is imperative that
15 the Court inform the parties on the following questions:

- 16 (a) What claims and factual disputes continue to exist?
17 (b) Which facts does the Court believe are not in material dispute? and
18 (c) Which claims does the Court believe it has resolved?

19 It is imperative, in the event the Court decided fewer than all claims, that the Court
20 consider CR 54(b) findings, which need not be entered (in which case no appeal periods
21 commence) or might be entered (in which case appeal periods do commence).

22 CR 54(b) provides for expedited review on fewer than all claims existing in a case, but
23 only when its requirements are met. Otherwise, the certification process more likely creates an
24 impediment to prompt appellate review. If the Court fails to enter the required findings of fact,
25 the appellate courts are likely to remand for entry of the those findings. Absent the required
26 findings, no final judgment exists until all of the claims are decided. CR 54(b)

1 The factors that should be considered in this Court’s CR 54(b) findings are expressly set
2 forth in Nelbro Packing Co. v. Baypack Fisheries, LLC, 101 Wn.App. 517, 6 P.3d 22 (2000).

3 These factors are:

- 4 1. What is the relationship between the adjudicated and the unadjudicated
5 claims?
- 6 2. Are questions which would be reviewed on appeal still before the trial
7 court for determination in unadjudicated portions of the case?
- 8 3. Is it likely that a need for review may be mooted by future developments
9 in the trial court?
- 10 4. Will an immediate appeal delay trial of unadjudicated matters without
11 gaining any offsetting advantage in terms of simplification and
12 facilitation of that trial? and
- 13 5. What are the practical effects of allowing an immediate appeal?

14 Intervenor Defendants ask for clarification of the Court’s November 5, 2004 Order so
15 that the parties may have knowledge sufficient to prepare for trial, whether a trial is contem-
16 plated, and to know when will appeal periods commence and on what claims.

17 **II. MOTION FOR RECONSIDERATION**

18 Intervenor defendants ask the Court to reconsider its November 5, 2004 Order “Grant-
19 ing/Denying Motions For Partial Summary Judgment.” Although Intervenor Defendants could
20 request reconsideration on numerous provisions set forth in the Court’s Order, only two key
21 issues are raised here:

22 **A. SOUND TRANSIT HAS FAILED TO PROVE THE EXISTENCE OF VALID BONDS:**

23 A statute enacted through the initiative process — I-776 — is, as are other statutes,
24 presumed constitutional. State ex rel. O’Connell v. Meyers, 51 Wn.2d 454, 458, 319 P.2d 828
25 (1957) (emphasis added). A Washington Constitution Article One § 23 claim alleging the
26 unconstitutionality of a state statute (I-776) must be proven beyond a reasonable doubt. Island
27 County v. State, 135 Wn.2d 141, 147, 955 P.2d 377 (1998).

1 Sound Transit must prove three elements:

2 Element “A” - that a valid contract exists;

3 Element “B” - that the challenged legislation substantially impairs it’s contract; and

4 Element “C” - if so, that there is no legitimate public purpose to justify the impairment.

5 Johanson v. Department of Social and Health Services, State of Wash., 91 Wn.App. 737,
6 959 P.2d 1166, *review denied*, 137 Wn.2d 1010, 978 P.2d 1099 (1998).

7 The first of these three elements — Element “A” — requires Sound Transit to establish
8 that it issued valid bonds. The question of validity of public contracts includes the burden to
9 prove the following:

- 10 1. Is there legislative or constitutional authority delegated to the municipality to
11 issue the bonds for the particular purpose?
- 12 2. Was the statute authorizing the bond issue constitutionally enacted? If not
13 constitutionally enacted or if unconstitutional for any other reason, the issue is
14 void and recitals are of no effect.
- 15 3. Is the purpose for which the bonds are issued a public and corporate purpose, as
16 distinguished from a private purpose?

17 15 EUGENE MCQUILLIN, MUNICIPAL CORPORATIONS § 43.04, at 575 (3d ed., 1995)

18 This statement from *McQuillen* was specifically adopted by our State Supreme Court in
19 King County v. Taxpayers of King County, et al., 133 Wn.2d 584, 595, 949 P.2d 1260 (1997).
20 Moreover, the Court in that case also recognized that the burden of proof on each of these three
21 elements rests with the parties asserting the validity of the bonds. In this case, Intervenor
22 Plaintiff Sound Transit and the State of Washington are those parties asserting bond validity.
23 King Cy. v. Taxpayers, supra, at page 595. Neither have properly met their burden.

24 Intervenor Defendants have made the argument that the State Legislature is constitution-
25 ally prohibited from creating local municipal corporations by special law. Washington
26 Constitution Article Eleven § 10. The legislature is powerless to delegate power that it does not
27 possess. State ex rel Tax Comm’n v. Redd, 166 Wash. 132, 6 P.2d 619 (1962). The legislature
28 was powerless to delegate to the county commissions the power to create independent local

1 governments, which is the undeniable consequence of either the 1993 or the 1994 amendments
2 to RCW 81.112.030, which according to the Court’s Order, eliminated voter ratification of
3 Sound Transit formation.

4 A recent case involving similar constitutional issues is Granite Falls Library Capital
5 Facility Area v. Taxpayers of Granite Falls, 134 Wn.2d 825, 953 P.2d 1150 (1998). At issue was
6 the creation, tax levy, and debt issue of a new RCW 27.15 Library Capital Facility District. That
7 statute (as did original RCW 81.112.030) required voter approval of the formation of the district,
8 and on the question of new debt that statute requiring a three fifths voter approval, consistent
9 with Washington Constitution Article Eight § 6. The ballot requirements and the election
10 outcome were key considerations thought by the Court to avoid related due process, Washing-
11 ton Constitution Article One § 19 suffrage protections, and Article Eleven local government
12 formation restrictions. The 1993 and 1994 amendments to RCW 81.112.030 (even if their
13 enactment complied with Article §§ 19 and/or 37) clearly eliminated the precise underpinnings
14 thought necessary in Granite Falls Library, supra. The Court’s Order does not consider this
15 glaring problem with Sound Transit’s assault on I-776.

16 The Court’s November 5, 2004 Order does not even address Sound Transit’s affirmative
17 obligation to prove, beyond a reasonable doubt, the first two elements [Element “A” and “B”].
18 Sound Transit’s September 27, 2004 Motion for Partial Summary Judgment and supporting
19 documents gave this Court no basis for adjudicating them favorably to Sound Transit. In
20 essence, the Court has absolved Sound Transit from the burden of proving its case. In addition,
21 this Court has created a non-existent burden upon Intervenor Defendants to disprove the validity
22 of Sound Transit’s bonds, and then it has prevented Intervenor Defendants’ ability to do so by
23 invoking a “laches” bar that does not apply, was never pled, and was not preserved. It was
24 inappropriate for the Court to enter a CR 56 ruling in favor of Sound Transit on the issue of valid
25 bonds where the Court made no factual or legal showing of entitlement to the relief Intervenor
26 Plaintiff Sound Transit requested.

1 Although Intervenor Defendants had no burden of proof, their own Motion For Summary
2 Judgment demonstrated that it was impossible — as a legal proposition — for Sound Transit to
3 prove that it issued valid bonds, because:

- 4 (1) Sound Transit did not meet RCW 81.112.030 voter approval conditions;
- 5 (2) Sound Transit could not constitutionally issue debt without specific voter approval of
6 agency formation;
- 7 (3) Sound Transit could not constitutionally issue debt without specific voter approval of
8 new and added local municipal debt limits, and
- 9 (4) Sound Transit exceeded the statutory authority of RCW 81.104.180.

10 Summary judgment is proper only when the pleadings, depositions, and admissions in
11 the record, together with any affidavits, show that there is no genuine issue as to any material
12 fact and that the moving party is entitled to judgment as a matter of law. CR 56(c). All facts and
13 reasonable inferences are considered most favorably to the non-moving party. Wilson v.
14 Steinbach, 98 Wash.2d 434, 437, 656 P.2d 1030 (1982). Generally, questions of fact are
15 properly left to the trier of fact; however, when reasonable minds could reach but one
16 conclusion, questions of fact may be determined as a matter of law. Trane Co. v. Brown-
17 Johnston, Inc., 48 Wash.App. 511, 513-14, 739 P.2d 737 (1987).

18 Factual disputes existed regarding the question of the controlling “financial framework”
19 alleged to have been “impaired” by I-776. Sound Transit relied solely upon documents
20 generated by itself, and the supporting expert opinion of an official from Merrill Lynch, the
21 financial advisor to Sound Transit and architect of the novel Series 1999 security provision.
22 This Series 1999 security provision was obviously designed not for security for bond purchas-
23 ers, but rather to concoct a shell to protect Sound Transit’s delegated taxing power from future
24 amendment by the sovereign (“the people”). That factual disputes exist about that bond question
25 is evident by comparing Sound Transit’s Jeff Brown Declarations to Intervenor Defendants’
26 Thomas A. Rubin declarations.

1 The record also shows that Sound Transit was engaged in discussions with the actual
2 bond purchasers following remand of this case, that those bond purchaser’s were aware of the
3 existence of this lawsuit, and that their concerns were limited to the impact of I-776 on future
4 bonds. Though the opportunity for factual support from actual purchasers existed, Sound
5 Transit failed to offer even a scintilla of evidence from these bond purchasers to support Sound
6 Transit’s claim that I-776 impaired the financial framework inducing 1999 Series bond
7 purchasers’ contract with Sound Transit.

8 The Thomas Rubin analysis of the appropriate financial framework is the valid analysis,
9 for it includes that which was omitted in Sound Transit’s motion — the bond purchasers are
10 presumed to be familiar with legal restraints upon the issuer’s authority. Chemical Bank v.
11 Washington Public Power Supply System, 102 Wn.2d 874, 691 P.2d 524 (1984). This is
12 particularly material to Sound Transit’s unequivocal duty to prove I-776 unconstitutional
13 beyond a reasonable doubt. Sound Transit sought — and received — an Order from this Court
14 that it is free to continue to collect the MVET — and to spend it as it wishes — without any
15 requirement that the MVET or other pledged tax revenue be applied to the retirement of the
16 bonds, as is specifically required by RCW 81.104.180. The appropriate remedy (if an
17 “impairment” is found to exist) is not to provide Sound Transit blank check immunity from I-
18 776; the remedy is to enforce I-776 except to the limited extent necessary to protect legitimate
19 interests of the bond purchasers, whose rights are the rights protected by Washington Consti-
20 tution Article Two § 23.

21 As Intervenor Defendants have previously argued, the express provisions of RCW
22 81.104.180 could not be clearer. Sound Transit was only delegated power to pledge the MVET
23 for the purpose of retiring bonds. That statute did not authorize Sound Transit to pledge to
24 “levy” and then to withdraw the levied tax from bond retirement purposes. But this is precisely
25 what this Court has ruled Sound Transit has the authority to do. A municipality’s powers are
26 limited to those conferred in express terms or those necessarily implied. In re Seattle, 96 Wn.2d
27

1 616, 629, 638 P.2d 549 (1981). Where the State Legislature has explicitly restricted the
2 delegation of “pledging” authority for the MVET to “retire bonds,” this Court can not grant
3 Sound Transit the authority to “pledge” the MVET for other purposes than bond retirement.
4 This Court’s ruling directly conflicts with and is beyond the authority delegated to Sound
5 Transit and bond purchasers in RCW 81.104.180.

6 To the extent that factual matters can be deemed undisputed, they do not support entry
7 of an Order in Sound Transit’s favor as a matter of law. To the extent material facts are in
8 dispute, no summary judgment order is appropriate. The credibility of expert witnesses and the
9 legitimacy of their opinions must be evaluated in a trial on the merits following cross
10 examination.

11 **B. THE DOCTRINE OF LACHES IS INAPPLICABLE:**

12 Intervenor Defendants previously briefed the “laches” argument to establish (1) that this
13 “defense” was not pled by any party, (2) that Sound Transit did not assert this issue for inclusion
14 in the Court’s May 3, 2004 post-remand Issue/Scheduling Order, (3) that mention of a “laches”
15 defense was first raised in responding briefs, (4) that such equitable defenses are not available
16 where the question of the authority of municipal corporations is raised [see Chemical Bank v.
17 Washington Public Power Supply System, 102 Wn.2d 874, 691 P.2d 524 (1984)], (5) that neither
18 the State nor Sound Transit offered proof to establish all of the required elements of “laches,”
19 and (6) that citizens are always entitled to establish that a municipal corporation’s formation is
20 “void” [see *McQuillen, Municipal Corporations*, §§ 3.45-3.56 (3d. ed)].

21 In any event, the record of this case clearly shows:

- 22 (1) that the Sound Transit formation question involves the violation by the State Legislature
23 of two state constitutional restrictions designed to avoid deceptive or misleading
24 legislative practices (Article Two § 19 in 1993 and Article Two § 37 in 1994);
25 (2) that Sound Transit’s 1996 ballot measure was expressly restricted to approving a tax
26 measure (and not the formation of the entity or compounded local debt limits);
27

- 1 (3) that no information was provided to 1996 voters about the manner in which Sound
2 Transit claimed to have come into existence as an independent municipal corporation
3 with debt limits beyond those of the three participating counties;
- 4 (4) that no information was provided to inform 1996 voters that Sound Transit even claimed
5 to be a municipal corporation with a separate and additional debt limit distinct and
6 independent of the three participating counties; and
- 7 (5) that, to the extent a factual record exists relative to the Intervenor Defendants, the record
8 shows that the Intervenor Defendants did not know of the Sound Transit formation
9 questions and — in the case of Intervenor Defendant Permanent Offense — involved
10 statewide voters living outside the local boundaries of Sound Transit or the boundaries
11 of any of the three participating counties, with absolutely no knowledge of Sound Transit
12 whatsoever..

13 Neither the State nor Sound Transit offered any evidence from which the Court could
14 conclude that the Intervenor Defendants “should have” known of any problems with formation
15 enabling legislation or Sound Transit’s formation or the effect that a void incorporation would
16 have on Sound Transit’s contracts.

17 Finally, the type of “conclusive” closure of the “lack of authority” question sought by
18 Sound Transit and by the State to be obtained through “laches” arguments in this case was
19 rejected by the State Supreme Court in Chemical Bank v. Washington Public Power Supply
20 System, 102 Wn.2d 874, 691 P.2d 524 (1984). In Chemical Bank, the Court recognized the
21 availability of declaratory relief to those seeking closure on municipal “authority” issues, and
22 the Court rejected the effort to gain such closure by resort to equitable defenses by those who
23 had failed to seek closure through available remedies. The Supreme Court’s reasoning is
24 particularly applicable in this case where bond issuer Sound Transit invokes equity to foreclose
25 debate about the validity of its own bonds, where it had the exclusive power to raise the
26 questions in a bond validation proceeding under RCW 7.25, and which would have provided
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1 the only opportunity to actually litigate these issues. King County v. Taxpayers of King County,
2 et al., 133 Wn.2d 584, 595, 949 P.2d 1260 (1997)

3 Finally, as argued above, this Court cannot switch the burden of proof on questions of
4 bond validity from Intervenor Plaintiff Sound Transit to the Intervenor Defendants, and then
5 prevent the Intervenor Defendants from defending by resort to equitable bars. The Intervenor
6 Defendants defend a state statute (I-776) against Sound Transit's claim that I-776 is unconsti-
7 tutional, a defense for the benefit of the entire State, and no claim of right based upon the lapse
8 of time is available. RCW 4.16.160. A Court is precluded from imposing a shorter period under
9 the doctrine of laches than that of a relevant statute of limitations. Brost v. L.A.N.D., Inc, 37
10 Wn. App. 372, 680 P.2d 453 (1984). Just as no statute of limitations bar exists to such defenses,
11 no laches bar can be imposed by this Court. Moreover, defenses to a cause of action are not time
12 barred. Seattle First Nat. Bank, N.A. v. Siebol, 64 Wash. App. 401, 824 P.2d 1252, *rev. denied*
13 119 Wn.2d 1010, 833 P.2d 386 (1992).

14 The Court must reconsider and change this portion of its decision.

15 III. CONCLUSION

16 Intervenor Defendants ask the Court to clarify its November 5, 2004 Order. Questions
17 related to possible appeal depend on such clarification as well as the status of a scheduled
18 December 13, 2004 trial on the merits.

19 Intervenor Defendants also ask the Court to reconsider and reverse those rulings
20 adjudicating the bond "impairment" and "laches" arguments of Intervenor Plaintiff Sound
21 Transit.

22 The financial and legal consequences of this Court's November 5, 2004 Order finding
23 I-776 unconstitutional are immense. The most obvious of those consequences include:

- 24 • assuring the collection of billions of dollars of MVET revenues beginning December 5,
25 2002 and extending over the next three decades and their expenditure in contravention
26 of state law;

- 1 • ignoring void municipal corporations, injecting judicial life where legislative life did not
2 exist, and doing so by misapplying judicial “equitable” notions;
3 • inviting any local government to insulate its taxes from state voter or legislative control
4 by the artifice of a pledge of taxing power ostensibly made to secure a de minimus bond
5 issue whose purchasers’ “lien” evaporates the instant the “lien” emerges; and
6 • inviting the creation of compounded local debt limits by elected officials without voter
7 approval.

8 DATED this 15th day of November 2004.

9 ROWLEY & KLAUSER, LLP

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12 _____
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