HONORABLE JOHN R. RUHL

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

S. MICHAEL KUNATH,

Plaintiff,

vs.

CITY OF SEATTLE,

Defendant.

SUZIE BURKE, *et al.*,

Plaintiffs,

vs.

CITY OF SEATTLE, *et al.*,

Defendants.

DENA LEVINE, *et al.*,

Plaintiffs,

vs.

CITY OF SEATTLE,

Defendant.

No. 17-2-18848-4 SEA

ECONOMIC OPPORTUNITY INSTITUTE'S REPLY TO *LEVINE* AND *BURKE* PLAINTIFFS' UNTIMELY OPPOSITION BRIEF

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I. INTRODUCTION

Levine and *Burke* plaintiffs' ("Plaintiffs'") untimely opposition brief rehashes meritless arguments made by plaintiff Kunath and others that the Court rejected when granting Economic Opportunity Institute ("EOI") intervenor status. The Court should declare RCW 36.65.030 unconstitutional and void.

II. AUTHORITY & ARGUMENT

A. Plaintiffs' Brief Should Be Stricken as Untimely.

The Court's order granting EOI's motion to intervene provides that EOI's participation is subject to the Court-ordered briefing schedule that Plaintiffs already agreed to. Order, 4-5. LCR 56 similarly requires that the deadline for briefs opposing summary judgment motions shall be as set forth in any case-specific scheduling order. Plaintiff Kunath understood this and timely responded to EOI's motion for summary judgment. The Court should strike Plaintiffs' untimely response brief and not allow them an advantage by feigning confusion.

B. SSB 4313 Violates The Single-Subject Rule Regardless Of Its Title.

EOI's reply to plaintiff Kunath addresses the relevant title of Substitute Senate Bill 4313 ("SSB 4313"). However, even if the Court were to use the truncated title and deem SSB 4313's title to be a general title, the bill still clearly violates the state Constitution's single-subject rule. Const., art. II, § 19. This is because the constitutional analysis looks to the bill's *topic*, not merely its title.

A bill with a general title does not automatically get a greenlight under the single-subject analysis. Rather, courts look to whether there is "a rational unity between the operative provisions themselves as well as the general *topic*" – not the general title – to determine if the

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law complies with the single-subject rule. *Lee v. State*, 185 Wn. 2d 608, 620-21, 374 P.3d 157 (2016) (emphasis added). *See also Fritz v. Gorton,* 83 Wn.2d 275, 290-91, 517 P.2d 911 (1974) (identifying relevant subject of the bill as "openness in government" despite those words appearing nowhere in the title).

SSB 4313's general *topic* is indisputably the combined city-county form of government. This topic is stated in the first section of the bill in no uncertain terms: "It is the intent of the legislature in enacting this chapter to provide for the implementation and clarification of Article XI, section 16 of the state Constitution, which authorizes the formation of combined city and county municipal corporations." Laws of 1984, ch. 91. § 1.

The bill's subdivisions must have rational unity with this "general purpose of the act" if the law is to stand. *Amalgamated Transit v. State,* 142 Wn.2d 183, 209, 11 P.3d 762, 782 (2000). The requisite unity cannot be found in SSB 4313. Section 3 of the bill, which prohibits net income taxes in traditional cities and counties, regulates a different subject than the act's stated topic and purpose: the combined city-county form of government. As Washington courts have repeatedly held, a bill primarily concerning one form of municipal government violates Article II, section 19 of the state Constitution when it purports to reach another form of municipal government. *Potter v. Whatcom County*, 138 Wash. 571, 576, 245 P. 11 (1926) (bill primarily concerning townships cannot impose a requirement on a county); *Cory v. Nethery,* 19 Wn.2d 326, 329-31, 142 P.2d 488 (1943) (bill concerning cities and towns cannot reach any other kind of taxing district). That describes SSB 4313 exactly. RCW 36.65 is therefore invalid.

Another equally important component of "rational unity" is the requirement that the operative provisions within the body of the legislation be germane to "one another." *Lee v. State*, 185 Wn. 2d at 620-21. SSB 4313 fails this test also. The prohibition on net income taxes in

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cities and counties is not germane to the bill's other operative provisions concerning the establishment of combined city-counties. Laws of 1984, ch. 91. §§ 2-6.

Plaintiffs largely ignore EOI's substantive arguments and binding case law holding that different types of local government are different subjects. Plaintiffs simply argue that any provision related to "local government" – no matter how unrelated to the other operative provisions of the bill – is okay. That argument is squarely rejected by numerous Supreme Court cases such as *Lee v. State,* which require unity among the bill's provisions. 185 Wn. 2d at 620-21. Furthermore, simply identifying an excessively broad common theme will not save the bill. *Id. See also Fed'n of Emps. v. State,* 127 Wn.2d 544, 576, 901 P.2d 1028 (1995) (Talmadge, J. dissenting) ("a law containing subdivisions that allegedly relate to a subject such as 'fiscal affairs,' 'government,' or 'public welfare' could violate the single-subject provision because the subject matter was excessively general"); *Pennsylvanians Against Gambling Expansion Fund, Inc. v. Commonwealth*, 583 Pa. 275, 296, 877 A.2d 383, 396 (2005) ("the vast subject of 'municipalities' stretched the concept of a single topic beyond the breaking point").

In carrying out Article XI, under which city-counties must have similar powers as other municipalities, the Legislature still needed to comply with Article II, section 19. "One requirement of the constitution is as mandatory in its nature as another." *State ex rel. Wolfe v. Parmenter*, 50 Wash. 164, 175, 96 P. 1047 (1908). The Legislature cannot bury substantive restrictions on one form of government in a bill or statute chapter that is otherwise about a different form of government. Rather, "[t]he proper legislative procedure is to enact separate, independent" legislation that *constitutionally* amends existing statutes on city and county taxation authority. *Flanders v. Morris*, 88 Wn.2d 183, 188, 558 P.2d 769, 773 (1977) (even the

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necessary breadth of an appropriations bill does not excuse compliance with Article II, sections 19 and 37).

As with the single-subject rule, Plaintiffs fail to make any cogent argument about how SSB 4313 complies with Article II, section 37, the constitutional prohibition on legislation that amends existing law by mere reference or implication. Plaintiffs' argument consists of a footnote denying that cities have broad taxing powers. But the Legislature and the Supreme Court have expressly stated otherwise. *See* RCW 35A.11.020 *and Watson v. City of Seattle*, 189 Wn.2d 149, 170, 401 P.3d 1 (2017) (noting Seattle's broad statutory and home rule taxation powers). Indeed, the only reason Plaintiffs are fighting to defend the constitutionality of RCW 36.65.030 is because they understand that Seattle has broad taxing authority under RCW 35A.11.020, as the Supreme Court acknowledged in *Watson*. Thus, if the Legislature wished to restrict RCW 35A.11.020's grant of "all powers of taxation for local purposes" to cities and carve out net income taxes, it would have to set forth RCW 35A.11 in full and show the new prohibition. Const., art. II, § 37; *Wash. Educ. Ass'n v. State*, 93 Wn.2d 37, 41, 604 P.2d 950, 953 (1980) (bill that restricted school district from increasing salaries was unconstitutional for implicitly amending statutes conferring on districts "all the usual powers of a public corporation" including the fixing of salaries). Here, SSB 4313 is void because it did not give notice to legislators that they were fundamentally altering the taxing authorities of every city in the state. *See id.*; *Flanders v. Morris*, 88 Wn.2d at 188.

As it stands, it is impossible to tell whether any legislators passed SSB 4313 because they wanted to prevent cities from taxing net income, rather than carrying out the bill's stated purpose. This is a tell-tale sign of a bill that violates the single-subject rule. *Lee v. State*, 185 Wn. 2d at 620. The problem is especially notable here because legislators had no reason to pay

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attention to a bill about city-counties, as none has ever existed in Washington. The taxing authority of traditional cities and counties, however, is an issue that is constantly debated. The legislative history[1] of SSB 4313 shows no debate on the bill, except for one instance when a legislator attempted to amend the bill with a provision on traditional county taxation, which was promptly rejected because others recognized that county taxation is a different subject. 2d Tonry Decl., Ex. 6 at 762. This suggests that the amendment of city taxing authority was largely concealed in violation of Article II. The Court should not hesitate to invalidate the statute.

C. EOI's Claim is Justiciable.

Levine plaintiffs essentially conceded that EOI's claim is justiciable when they admitted that the applicability of RCW 36.65.030 and the validity of the Ordinance are issues of "broad, overriding public import." *Levine* Plaintiffs' Amend. Complaint, ¶¶ 17, 52. This alone is sufficient to invoke the Court's jurisdiction. *Lee v. State,* 185 Wn. 2d at 617; *Sorenson v. Bellingham,* 80 Wn. 2d 547, 558, 496 P.2d 512 (1972).

1. EOI Has Standing.

Plaintiffs cannot both rely upon RCW 36.65.030 and prevent the Court from understanding that statute's fatal defects through meritless standing challenges.

[1] Plaintiffs' motion to strike EOI's legislative materials is specious: The titles on the documents are not assertive statements and thus not excludable hearsay. *State v. Modest*, 88 Wn. App. 239, 944 P.2d 417 (1997). Official certification is *not* the exclusive means of authenticating legislative records; a declaration of counsel is sufficient, especially where, as here, authenticity is uncontested. ER 901. Furthermore, the legislative reports which are available in published volumes at the library, need no authentication. Finally, legislative history is decidedly relevant to the single-subject analysis. *Fed'n of Emps. v. State,* 127 Wn.2d at 576 (Talmadge, J. dissenting) (collecting cases analyzing legislative history to assess rational unity, find evidence of logrolling, and determine whether the Legislature has historically considered matters together).

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Plaintiffs misapprehend the "zone of interests" test when they argue that EOI has to be regulated by RCW 36.65.030 to challenge its constitutionality. *Wash. Ass'n for Substance Abuse & Violence Prevention v. State*, 174 Wn.2d 642, 653-54, 278 P.3d 632 (2012) (hereinafter "*WASAVP*") (non-profit organization permitted to challenge liquor store privatization law that indirectly affected its mission but did not regulate it). The relevant question is whether EOI will be harmed if RCW 36.65.030 stands to invalidate the Ordinance. *State v. Christopher*, No. 45694-0-II, 2015 Wash. App. LEXIS 1775, at *6 (Ct. App. Aug. 4, 2015) (unpublished) (citing *State v. Jendrey*, 46 Wn. App. 379, 384, 730 P.2d 1374 (1986); *State v. Lundquist*, 60 Wn.2d 397, 401, 374 P.2d 246 (1962)). Applying the correct legal framework, EOI easily satisfies the "zone of interests" test. Burbank Decl.., ¶¶ 1, 6-7; *WASAVP*, 174 Wn.2d at 653-54.

Similarly, because EOI's "goals . . . could reasonably be impacted by" Plaintiffs' attempt to invalidate the Ordinance, EOI has established injury in fact. *Id.* (law's potential impact on organization's goal of preventing substance abuse was sufficient to establish injury in fact as to organization); Burbank Decl.., ¶¶ 1, 6-7.

2. The State Need Not Be A Party.

As EOI explained in its reply brief in support of its intervention, the State is not a necessary party to EOI's challenge to RCW 36.65.030. RCW 7.24.110 merely requires notice to the Attorney General when a party challenges the constitutionality of a statute. *See, e.g., Kendall v. Douglas*, 118 Wn. 2d 1, 10-11 (1991). The Attorney General "is not obliged to appear" and may even waive service. *Zimmer v. Seattle*, 19 Wn. App. 864, 869-70 (1978); *Leonard v. Seattle*, 81 Wn. 2d 479, 482 (1972) (State refused to appear, being satisfied that others would defend statute). EOI provided the Attorney General with the statutorily required notice, and

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Plaintiffs are vehemently defending the statute. Nothing more is required to invoke the Court's power to declare RCW 36.65 unconstitutional and void. *Zimmer*, 19 Wn. App. at 869-70.

III. CONCLUSION

EOI respectfully requests that the Court invalidate RCW 36.65.030.

RESPECTFULLY SUBMITTED this 13th day of November, 2017.

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The above-signed attorney certifies that EOI's reply in support of its motion for summary judgment contains 1,689 words, its motion to strike Plaintiffs' brief as untimely contains 87 words, and its response to Plaintiffs' motion to strike contains 121 words, all in compliance with the Local Civil Rules.

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