



Washington State Senate

March 2, 2017

Mr. Bob Ferguson
Attorney General
P.O. Box 40100
Olympia, WA 98504-0100

RE: Informal Opinion Request

Dear Attorney General Ferguson:

We write to you with concern regarding the inflated motor vehicle excise tax (MVET) schedule used by Sound Transit to calculate the amount due for car owners within the regional transit authority. A number of articles have appeared in the media recently that detail the shock that many of our constituents have felt in receiving their car tabs over the last few weeks in which the amount they have usually paid has ballooned by hundreds of dollars. This is due to Sound Transit's use of an MVET schedule that allowed for it to charge for the manufactured suggested retail price (MSRP) as opposed to other more realistic schedules that would actually reflect the real value of the cars.

It has come to our attention that the act which authorized Sound Transit to use the inflated MSRP schedule was improperly drafted in such a way as to violate the state constitution. If so, it is our belief that the invalidation of this provision or act would have legal consequences for any contracts entered into between Sound Transit and any other entity that pledged the MVET revenue. These could include voiding or reforming loans or bond contracts. Because we are considering legislation or other action to address this matter, we are asking your office to provide an informal opinion on this matter.

Background:

In 2015, the state Legislature voted to enact a transportation revenue package which included ten bills that provided revenue, spending, bonding, and reforms in order to meet the transportation needs of the state. 2ESSB 5987 (2015) served as the revenue bill for the package and included an authorization for the state's sole regional transit authority, Sound Transit, to proceed with approval from the voters with a third construction program (ST3) that included bus service, light rail, and other elements. ST3 included three sources of revenue: an MVET, property tax and additional sales tax.

The law at the time prior to the passage of 2ESSB 5987 (2015), codified at RCW 82.44.035, provided MVET vehicle valuation schedules based upon the age of the vehicles, including the following provision:

(3) For the purpose of determining any locally imposed motor vehicle excise tax, the value of a vehicle other than a truck or trailer shall be eighty-five percent of the manufacturer's base suggested retail price of the vehicle when first offered for sale as a new vehicle, excluding any optional equipment, applicable federal excise taxes, state and local sales or use taxes, transportation or shipping costs, or preparatory or delivery costs, multiplied by the applicable percentage listed in this subsection (3) based on year of service of the vehicle.

Regarding the new ST3 MVET, it is important to note that the provisions regarding the revenue authorization for Sound Transit in the transportation package originated as a separate bill SB 5128 (2015) sponsored by Sen. Liias. Following extended negotiations with both the House and Senate, the Sound Transit MVET provisions of SB 5128 were included verbatim in 2ESSB 5987 (now codified at RCW 81.104.160). The provision included the following vehicle valuation language:

Notwithstanding any other provision of this subsection or chapter 82.44 RCW, a motor vehicle excise tax imposed by a regional transit authority before or after July 15, 2015, must comply with chapter 82.44 RCW as it existed on January 1, 1996, until December 31st of the year in which the regional transit authority repays bond debt to which a motor vehicle excise tax was pledged before July 15, 2015. Motor vehicle taxes collected by regional transit authorities after December 31st of the year in which a regional transit authority repays bond debt to which a motor vehicle excise tax was pledged before July 15, 2015, must comply with chapter 82.44 RCW as it existed on the date the tax was approved by voters.

The problem with this provision is that it purported to modify the effect and timing of the previously existing vehicle valuation schedule in RCW 82.44.035 *without actually amending that provision of law*. The provision attempted to do so by a general reference not even to the operative provision itself but rather to the entire chapter in which the provision appears. This would be akin to repealing the death penalty in the state of Washington by a general reference to the Sentencing Code in Chapter 9.94A RCW.

The difficulty in ascertaining the impact of the provision is compounded by the fact that it requires compliance with "chapter 82.44 RCW as it existed on January 1, 1996 . . ." The problem is that the schedule in place on that date had been repealed and was not in force in 2015. This means that at the time of the passage of 2ESSB 5987, there would be no current law statute to check in order to understand the full effect of the provision. A legislator or member of the public would be required to obtain a historical copy of the code from 1996 or prior to the provision's repeal in order to understand precisely what MVET schedule would be implemented.

Following enactment of 2ESSB 5987 and the other bills associated with the transportation package, Sound Transit launched a campaign to win voter approval for a \$54 billion spending plan. The plan included the revenue from the enhanced MVET schedule. The plan was approved by voters in November of 2016. According to a statement released to the media on December 13, 2016, Sound Transit executed the sale of \$477 million in bonds to help fund the ST3 plan, backed in part by Sound Transit's MVET.

Analysis:

I. Whether the MVET vehicle valuation provision in 2ESSB 5987 constituted amendment by reference in violation of Article 2, Section 37 of the Washington State Constitution.

Article 2, section 37 of the Washington State Constitution provides as follows:

No act shall ever be revised or amended by mere reference to its title, but the act shall be set forth at full length.

The purpose of the constitutional provision requiring that the amended or revised acts be set forth in full is intended to protect the Legislature and public from fraud and deception and to avoid confusion, ambiguity and uncertainty. The provision avoids mischief due to the difficulty of the necessary examination and comparison to existing statutes when not apprised of changes made in other laws. State v. Tessema, 139 Wash. App. 483 (2007) rev. denied 163 Wash. 2d 1018 (Wash. 2007). Courts have established a two-part test for determining if a law violates this provision. The test is: (1) whether the new enactment is such a complete act that the scope of the rights and the duties created or affected by the legislative action can be determined without referring to any other statute or enactment and (2) whether a straightforward determination of the scope of rights and duties under the existing statutes would be rendered erroneous by the new enactment. Id.

The Washington State Supreme Court has also carved out exceptions to the test above. Complete acts which (1) repeal prior acts or sections thereof on the same subject; (2) adopt by reference provisions of prior acts; (3) supplement prior acts or sections thereof without repealing them; and (4) incidentally or impliedly amend prior acts, are exempted from the constitutional requirement to amend in full. Citizens for Responsible Wildlife Management v. State, 149 Wash.2d 622 (Wash. 2003).

The statute at issue is RCW 81.104.160(1) that reads in part:

Notwithstanding any other provision of this subsection or chapter 82.44 RCW, a motor vehicle excise tax imposed by a regional transit authority before or after July 15, 2015, must comply with chapter 82.44 RCW as it existed on January 1, 1996, until December 31st of the year in which the regional transit authority repays bond debt to which a motor vehicle excise tax was pledged before July 15, 2015. Motor vehicle taxes collected by regional transit authorities after December 31st of the year in which a regional transit authority repays bond debt to which a motor vehicle excise tax was pledged before July 15, 2015, must comply with chapter 82.44 RCW as it existed on the date the tax was approved by voters.

This provision fails the two part test. As noted above it is impossible to know the precise vehicle valuation schedules for Sound Transit's new MVET without reference to the repealed provision of ch. 82.44 as it existed in 1996. Moreover, the straightforward determination of the MVET schedule as outlined in RCW 82.44.035 prior to the passage of 2ESSB 5987 would be rendered erroneous, as 2ESSB 5987 makes no direct amendment to this statute.

The provision at issue also does not fall under one of the recognized exceptions. It neither repeals acts or sections, adopts by reference provisions of prior acts, supplements prior acts without repealing nor incidentally amends prior acts. The proper way for this provision to have

been drafted would have been to amend RCW 82.44.035. In failing to even reference this statute, RCW 81.104.160 violated Article 2, section 37 of the state constitution.

II. If RCW 81.104.160 violates the state constitution, what are the remedies available?

Invalidation of the unconstitutional enactment is the proper remedy for a violation of the constitutional requirement that legislation that amends other acts must set them forth at length. Amalgamated Transit Union Local 587 v. State 142 Wash. 2d 183 (2000). It is unclear what impact a court's determination that RCW 81.104.160 is unconstitutional and invalid would have on the loan instrument or bond contracts that Sound Transit has entered into that pledge MVET revenue. Ostensibly, if Sound Transit never had the constitutional authority to collect the revenue pledged, such contracts are *void ab initio* as *ultra vires*.

Questions:

In light of the facts and analysis provided above, we respectfully request that your office issue an informal opinion on the following two questions:

1. Whether the provision in 2ESSB 5987 (codified in RCW 81.104.160(1)) constituted amendment by reference in violation of Article 2, Section 37 of the Washington State Constitution.
2. If so, what are the remedies available and impact to agreements that Sound Transit may have entered into that pledged MVET revenue for repayment?

We realize that your office ordinarily does not issue advisory opinions as to the constitutionality of laws, however in light of the importance of this matter we are requesting that your office use whatever means it has including the employment of outside counsel in addressing potential conflicts of interest.

We greatly appreciate your time and attention to this matter.

Sincerely,



Senator Steve O'Ban
28th Legislative District



Senator Dino Rossi
45th Legislative District