IN THE SUPREME COURT OF THE STATE OF NEVADA

CITY OF FERNLEY, NEVADA, a Nevada municipal corporation,

Appellant,

vs.

THE STATE OF NEVADA ex rel. DEPARTMENT OF TAXATION; THE HONORABLE DAN SCHWARTZ, in his official capacity as TREASURER OF THE STATE OF NEVADA; and THE LEGISLATURE OF THE STATE OF NEVADA,

Respondents.

Electronically Filed
Aug 07 2015 02:47 p.m.
Tracie K. Lindeman
Clerk of Supreme Court

Supreme Court No.: 66851

District Court Case No.: 12 OC 00168 1B

APPELLANT'S REPLY BRIEF

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Docket 66851 Document 2015-23933

NRAP 26.1 DISCLOSURE

The undersigned counsel of record certifies that there are no persons or entities as described in NRAP 26.1(a) that must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 7th day of August, 2015.

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APPELLANT'S REPLY BRIEF

Appellant City of Fernley, Nevada ("Fernley"), a municipal corporation of the State of Nevada, hereby files its Reply Brief in accordance with NRAP 28 and 32.

In this Reply Brief, Fernley refrains from repeating the arguments set forth in its Opening Brief, but does address new matters raised by the Nevada Department of Taxation ("Department"), the Treasurer of the State of Nevada ("Treasurer," together with the Department, "State"), and the Legislature of the State of Nevada ("Legislature," together with the State, "Respondents"). Respondents have filed a joint answering brief in this appeal.

I. ARGUMENT

A. The Overriding Purpose of the C-Tax System is to Preserve and Perpetuate the Status Quo of 1997.

As noted in Fernley's opening brief, the primary goals of the C-Tax system upon its implementation in 1997 were to: (1) preserve the "status quo" of distributions to C-Tax recipients; and (2) distribute future increases in the C-Tax to areas of growth. (Opening Brief, 4-7). Respondents do not dispute these goals, but claim instead that another goal of the C-Tax system was to favor what Respondents call "general-purpose" governments. This claim, however, is severely undercut by several undisputed aspects of the C-Tax system.

First, when base distributions were set in 1997, no consideration whatsoever was given to the type of services provided by local governments, and there was no requirement that a local government provide any particular service. (JA 14:2629-2630; 2606). Second, there is no mandate that C-Tax distributions be decreased for local governments that decrease or discontinue any type of service. (See, e.g., NRS Chapter 360, see also JA 14:2626-2627, JA 13:2438). Third, there is no mandate that C-Tax distributions be decreased for local governments that experience a decline in population or assessed valuation.[1] See NRS 360.695.

If a preference for "general-purpose" local governments was indeed a central tenant of the C-Tax system, there would have been a consideration of the type of services provided by local governments when base distributions were set in 1997. There would have been a requirement that C-Tax revenues decrease if services are decreased or discontinued. There would have been a requirement that revenues actually follow both growth in population and assessed valuation and decreases in population and assessed valuation. The failure of the C-Tax system to address these issues undercuts the credibility of any claim that a primary goal of the C-Tax system is to reward "general-purpose" local governments.

[1] The Department has discretion to decrease C-Tax distributions to a local government that experiences a decline in population and assessed valuation over a three-year period. See NRS 360.695. It is undisputed that those conditions have existed on multiple occasions but the Department has not decreased any C-Tax revenues. (JA 14:2477-2480; JA 14:2627-2628).

Instead, the primary goal of the C-Tax system was to perpetuate the ratios of distribution to local governments that existed in 1997. The "haves" of 1997 continue to do well to this day, while the "have nots" of 1997 remain stuck with an artificially low base distribution. Specifically, and as noted in Fernley's Opening Brief, a city that incorporates after 1997 is subject to different and insurmountable barriers that did not exist for cities incorporating prior to 1997.

B. Other Statutory Paths to C-Tax Adjustments are Unavailable to Fernley.

Respondents suggest to this Court that Fernley can also obtain a C-Tax adjustment pursuant to NRS 354.598747 or NRS 360.740 via cooperative agreements between local governments.

However, Respondents ignore the undisputed fact that since the C-Tax system was implemented in 1997, there have been only two cooperative agreements to reallocate C-Tax revenues, and neither involved one local government taking over any services of the other. (JA 14:2504-2509; JA 14:2462-2463).

Moreover, as Fernley points out Lyon County has repeatedly refused to take action on even modest requests for reallocation from Fernley. See Fernley's Opening Brief, 16. Respondent's claim that Lyon County has expressed a willingness to such a reallocation is belied by such refusals, and by the fact that

Lyon County has stridently lobbied the Legislature against any reallocations to Fernley. Action, or in this case, inaction, speaks louder than any platitudes.

The lack of cooperative agreements to share services is a direct function of how precious C-Tax revenues are to local governments. No local government wants to give up any portion of those revenues.

C. Respondents are Judicially Estopped from Taking Conflicting Positions.

In its opening brief, Fernley points out that purported statutory paths to a greater distribution in the C-Tax system are legally unavailable. Pursuant to NRS 360.740, a local government can request a greater distribution if it: (1) has a police department and; (2) makes its request by December 31 of the year before the first year it receives any C-Tax distributions.

Prior to the filing of the underlying Complaint in this case, Fernley received an advisory opinion from the Department stating that a distribution pursuant to NRS 360.740 was only available to Fernley when it incorporated in 2001 and only if it started a police department at that time. [2] (JA 15:2728-2730). Respondents now argue to the contrary of that advisory opinion, claiming that NRS 360.740 adjustments are available to any local government at any time. (See Respondents' Joint Answering Brief, 20-24).

[2] Advisory Opinions are legal interpretations on matters within the jurisdiction of the Department. NAC 360.190.

As an initial matter, this Court has held that the Department is judicially estopped from taking conflicting positions on statutes within its jurisdiction. See Southern California Edison v. First Judicial District Court of the State of Nevada, 127 Nev.Adv.Op. 22, 9 (May 26, 2011) (Holding that the Department was judicially estopped from invoking the administrative review standards of Chapter 233B on a refund claim when it had previously and inconsistently claimed that refunds should be processed under NRS 372.680). The same situation exists here. The Department initially informed Fernley that adjustments pursuant to NRS 360.740 were not available. The Department, and the other parties signing the joint answering brief, are judicially estopped from taking a conflicting interpretation of the statute on this appeal.[3]

Regardless, as stated in Fernley's opening brief, the legal interpretation set forth in the advisory opinion is correct. The plain language of NRS 360.740 places strict limitations on the ability of a local government to seek an adjustment. Accordingly, even if Fernley wanted to apply for additional funds via NRS

[3] In the proceedings before the District Court, the Department filed separate briefs and did not dispute Fernley's reliance on the advisory opinion or the conclusions therein. (JA 12:2053-2224; 13:2225-2353). On appeal, however, the Department has signed the joint answering brief and taken a conflicting position. It also bears note that the only defendants in the underlying complaint were the Department and Treasurer. The Legislature intervened in this case over the objection of Fernley. (JA 2:324-330).

360.740, it could not do so, and the Department which administers and enforces the application process has specifically said so to Fernley.[4]

The Respondents do not address another fundamental barrier in NRS 360.740. The statute provides that any requests for an adjustment are reviewed by the Committee on Local Government Finance ("CLGF"), and if the CLGF determines that an adjustment is not warranted, there can be no appeal. NRS 360.740(4).[5] Moreover, there is no dispute that one of the members of the CLGF is a lobbyist paid by Lyon County to prevent Fernley from obtaining additional C-Tax distributions. (JA 13:2427-2429; JA 14:2448-2450).

Accordingly, Fernley has no ability to obtain a C-Tax adjustment pursuant to NRS 360.740.

D. <u>Legislative Oversight of the C-Tax System is Minimal.</u>

Respondents suggest that the Legislature has consistently undertaken a thorough review of the C-Tax system. A closer review of that claim demonstrates that the Legislature's oversight suffers from serious deficiencies.

The Legislature may undertake periodic reviews of the minutia of C-Tax distributions, but has utterly failed to undertake a substantive review of whether C-

[4] Contrary to Respondent's assertions, Fernley is under no obligation to appeal an advisory opinion, particularly when its analysis is correct.

[5] Even if the CLGF were to recommend an adjustment, this could implicate the Separation of Powers clause of the Nevada Constitution as a non-legislative and non-elected body would be appropriating funds. See Nevada Constitution Article 3, Section 1.

Tax distributions are in any way appropriate to meet service levels of local governments. There is no consideration given to whether a local government may receive excessive C-Tax, and no consideration given to whether a local government may receive wholly inadequate C-Tax. Instead, as the Legislature admitted in discovery, local government budgets are simply placed in a "file drawer" and rarely referred to. (JA 15:2710-2712).

For example, Assembly Bill 68, passed by the Legislature in 2013, is a bill Respondents claim is representative of a study of "all aspects" of the C-Tax system. That is wholly inaccurate. A review of the 2011-2013 C-Tax Study giving rise to Assembly Bill 68 shows there was no review whatsoever of services provided by local governments and whether C-Tax distributions were sufficient to fund such services. (JA 18:3187-3267). Instead, the study, and ultimately the legislation, focused on the minutia of how excess distributions are calculated, and ultimately resulted in legislation that, unsurprisingly, continued to perpetuate the status quo by ensuring that any excess C-Tax distribution were rolled into a base distribution for future years. (Assembly Bill 68 (2011)). The 2011-2013 C-Tax Study and Assembly Bill 68 hardly represent a study of "all aspects" of the C-Tax system.

The other bills cited by Respondents as demonstrative of an "all aspects" study are similarly lacking in any examination or impact on the question of

whether distributions were appropriate, and each ultimately served to perpetuate the status quo. See Senate Bill 534 (1999) (providing that the Department may decrease C-Tax distributions if population and assessed valuation decrease for three consecutive years, which, as noted above, has been ignored by the Department); Senate Bill 535 (1999) (technical change applicable to redevelopment agencies); Senate Bill 538 (1999) (technical change clarifying the first year to consider for excess distribution calculations); Senate Bill 317 (2001) (created the CLGF); Assembly Bill 653 (2001) (technical changes to the calculation of excess distributions, and replaced by Assembly Bill 10 of the 2001 Special Session); Assembly Bill 10 (2001 Special Session) (technical changes to the calculation of excess distributions, and a $4,000,000 based distribution adjustment for the City of Henderson)[6]; Senate Bill 469 (2003) (technical changes to the calculation of excess distributions); Assembly Bill 144 (2005) (unsuccessful bill to increase base distribution of North Las Vegas by $10,000,000); Senate Bill 38 (2005) (technical changes to the calculation of excess distributions); Senate Bill 96 (2007) (unsuccessful bill to reallocate a portion of the C-Tax to school districts); Senate Bill 153 (2007) (unsuccessful bill to create a library district to receive C-Tax distributions); Senate Bill 88 (2009) (unsuccessful bill to increase

[6] The $4,000,000 base adjustment for Henderson came at a time when the Speaker of the Assembly represented Henderson, and represents the only substantive base distribution adjustment in the history of the C-Tax. (JA 14:2611-2612; 15:2668-2669; 2684-2685; 14:2469-2470).

the base distribution of Reno by $2,000,000); Senate Bill 294 (2009) (unsuccessful bill to create an interim committee to study the C-Tax); Assembly Bill 47 (2011) (unsuccessful bill to increase the base distribution of Fernley by $5,000,000); Assembly Bill 71 (2011) (created an interim committee to study the C-Tax, recommended legislation passed as Assembly Bill 68 (2013)); Senate Bill 31 (2011) (technical changes to time period for interlocal agreements); Assembly Bill 68 (2013) (requires excess distributions to be rolled into the next years base distribution); Senate Bill 400 (2013) (various changes to the net proceeds of minerals tax).

It is notable that every piece of legislation considered by the Legislature addressed the calculation of C-tax distributions, but avoided the substantive question of whether those distributions are appropriate in the first place. Again, the legislation considered over the years does not review "all aspects" of the C-Tax system, but instead is designed to perpetuate the status quo of 1997.

E. Acceptance of Respondents Statute of Limitations Argument Would Preclude any Legal Challenges to the C-Tax System.

Respondents claim that Fernley had a two or four year statute of limitations from its date of incorporation to file a constitutional challenge to the C-Tax system. The implications of such an argument should be carefully examined, as what the Respondents propose would effectively eliminate any constitutional

challenges to the C-Tax system, or to any law in which a constitutional infirmity is latent and does not manifest itself immediately.

For example, in 2001 Fernley likely had no interest to file a suit as it did not anticipate the explosive growth it would experience, the consequent demands on its service requirements from such growth, and the barriers to a C-Tax adjustment it would face. Yet according to Respondents, Fernley was obligated to raise its constitutional objections at that time based purely on hypothetical assumptions.[7] Needless to say such a lawsuit at that time would have faced insurmountable legal defenses.

Instead, as time went by and the inequities and constitutional infirmities in the C-Tax system became manifest, Fernley attempted its other options before filing suit. Fernley sought an advisory opinion from the Department and was told its only option was to seek a cooperative agreement with another local government. (JA 15:2718-2730). Fernley made repeated efforts to obtain a cooperative agreement but was unsuccessful. (Opening Brief, 16). Fernley made repeated efforts to seek a legislative change to the C-Tax system and was unsuccessful in

[7] Respondents also suggest that the Fernley Incorporation Committee in 1998 was advised that Fernley would not receive additional C-Tax revenues by virtue of incorporation. The Fernley Incorporation Committee was composed of non-elected and non-appointed citizens. (JA 20:3535). Respondents cite to no authority, because none exists, for their suggestion that such a body can forever bind future residents and governments of the city.

that arena as well. Litigation in this case was, as it should be, a last resort. Yet, under Respondents position litigation would be the first resort.

An adoption of Respondents position would create precedent that there is no remedy for latent constitutional claims. It is precisely to avoid this harsh result that this Court should either determine that there is no period of limitations for claims brought pursuant to Article 3, Section 1, Article 4, Section 20, or Article 4, Section 21. If this Court does determine that a period of limitations is appropriate, this Court should follow the lead of federal courts in Nevada and adopt the "continuing violations" doctrine whereby a "systematic policy . . . is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period." *Chachas v. City of Ely*, 615 F.Supp.2d 1193, 1203 (D.Nev. 2009).

The C-Tax system is the type of systematic statutory scheme where application of the continuing violations doctrine is appropriate. The inflexible system treats cities that incorporated after 1997 differently than other cities. Moreover, only declaratory and injunctive relief is sought by Fernley in this case, so the adoption of the continuing violations doctrine in this context has no fiscal impact on prior year C-Tax distributions.

Even if this Court does not adopt the continuing violations doctrine, a statute of limitations does not run until a wrong occurs and a party sustains injuries. See *Peterson v. Bruen*, 106 Nev. 271, 274, 792 P.2d 18, 20 (1990). The constitutional

wrongs to Fernley may not have been apparent in 1997 or even 2001, but are manifested today. Accordingly, any statute of limitations should run from the date of annual C-Tax distributions, not from the arbitrary date of incorporation.

For all of these reasons, Fernley's claims should not be time-barred by a statute of limitations.

F. Laches Does Not Apply.

The District Court did not accept Respondents' laches argument, and it should similarly be rejected by this Court. Although laches may apply to constitutional claims, "[e]specially strong circumstances must exist" to sustain the defense when, as in this case, the statute of limitations has not run. See Lanigir v. Arden, 82 Nev. 28, 36, 409 P.2d 891, 896 (1966). To determine whether laches bars a claim, a court must consider: "(1) whether the party inexcusably delayed bringing the challenge, (2) whether the party's inexcusable delay constitutes acquiescence to the condition the party is challenging, and (3) whether the inexcusable delay was prejudicial to others." See Miller v. Burk, 124 Nev. 579, 598, 188 P.3d. 1112, 1125 (2008). Laches requires more than simply a delay in bringing a legal challenge – i.e., the delay must disadvantage another party. See Home Sav. Ass'n v. Bigelow, 105 Nev. 494, 496, 779 P.2d 85, 86 (1989). The party asserting laches therefore "must show that the delay caused actual prejudice" and that "granting relief to the delaying party would be inequitable." See Besnilian

v. Wilkinson, 117 Nev. 519, 522, 25 P.3d 187, 189 (2001); see also Memory Gardens of Las Vegas, Inc. v. Pet Ponderosa Mem'l Gardens, Inc., 88 Nev. 1, 5, 492 P.2d 123, 125 (1972) ("[t]he alleged prejudice cannot be prospective or illusory"). It is well-settled that the "applicability of the doctrine of laches turns upon the peculiar facts of each case." See Home Sav. Ass'n v. Bigelow, 105 Nev. 494, 496, 779 P.2d 85, 86 (1989); see also Widdis v. Second Judicial Dist. Court, 114 Nev. 1224, 1228, 968 P.2d 1165, 1167 (1998) (holding that laches was inapplicable where there was no evidence that the delay in filing a writ petition was inexcusable, demonstrated acquiescence, or caused undue prejudice).

No legal or factual basis exists for applying the doctrine of laches here. Most notably, there has been no delay by Fernley in filing suit because the administration and execution of the C-Tax has indisputably resulted in the continuing violation of its rights under the Nevada Constitution since its incorporation in 2001. See Oliver v. SD-3C LLC, 751 F.3d 1081, 1086 (9th Cir. 2014) (the same principles that govern a statutes of limitations defense apply to laches). Even if the Court were to disregard the continuing nature of the constitutional violations at issue here (which it should not), Fernley indisputably filed suit only as a last resort, after having first diligently sought to find an amicable solution for its grossly inequitable treatment under the C-Tax system. Specifically, Fernley unsuccessfully lobbied for relief from the Legislature,

requested assistance from the Department, and pursued adjustments from Lyon County before commencing this action. (JA 8:1519; 1522-1523; 1526; JA 9:1886-1890; 1892-1893; 1894-1915). As a result, Fernley has neither delayed in its efforts to seek relief nor acquiesced in its condition. Fernley has instead taken every reasonable step possible to remedy its substantial C-Tax shortfall without having to seek relief from this Court.

Finally, it is equally indisputable that the timing of Fernley's commencement of this lawsuit did not prejudice the State, the Legislature, or any other participant in the C-Tax system. When compared to similarly situated Nevada cities, Fernley has plainly received a disproportionately small share of C-Tax distributions. (JA 7:1496). Other participants in the C-Tax system therefore necessarily have received a disproportionately large share of C-Tax distributions. Any purported delay by Fernley in bringing this action consequently was beneficial, not prejudicial, to other C-Tax participants because it allowed them to receive more C-Tax revenues than they otherwise were entitled to under the C-Tax formula. Consequently, laches does not bar any of Fernley's claims as a matter of law.

G. Respondents' Characterization of Fernley's Case as a "Money Grab" is Specious and Disappointing.

The record in this case consists of extensive evidence of the burdens faced by Fernley to provide adequate services to its residents. For example, Fernley has

three or four sheriff deputies patrolling the city at any given time. (JA 15:2742-2744). Under the national average for cities of Fernley's population, there should be 38 deputies on patrol at any given time. (Id.; see also JA 17:2860-2874). Since 2009, Fernley has only been able to repair 900 feet of its roadways, and many major thoroughfares are plagued with massive cracks. (JA 15:2812-17:2859). Parks, playgrounds, drainage basins and cemeteries are in general states of disrepair and deterioration. (Id.).

None of this evidence was refuted, or even addressed, by Respondents in their answering brief. Instead, the Respondents characterize Fernley's efforts to provide basic services to its citizens as a "money grab." [8] Minimal law enforcement, disintegrating roadways, and desolate parks and playgrounds. Fernley's efforts to redress these problems are anything but a "money grab." Instead, Fernley's actions are those of a government trying to create a better community for its citizens.

II. CONCLUSION

The Legislature may have considerable lawmaking authority, but any such laws must still comply with constitutional limitations. Fernley is the only city in

[8] Any suggestion from Respondents that Fernley should seek legislative relief should also be viewed in the context of the Legislature's endorsement of Fernley's efforts as a "money grab." Fernley's legislative efforts were unsuccessful in 2011, 2013 and again most recently in 2015. It should also be noted that despite initially agreeing to participate in the settlement program in this appeal, the Legislature thereafter refused to participate and the matter was referred back to this Court.

Nevada to incorporate since the implementation of the C-Tax system in 1997 and is subject to a different set of standards, including insurmountable standards, than other cities receiving C-Tax distributions which incorporated prior to 1997. A tax collection and distribution system that locks in place distribution levels set in 1997, and precludes new cities from any realistic means to obtain a greater share of the distributions, violates Article 4, Section 20 and 21, as well as Article 3, Section 1 of the Nevada Constitution.

For all of the reasons set forth in Fernley's Opening Brief, and the reasons set forth above, Fernley respectfully requests that this Court reverse and remand this matter to the District Court for an entry of declaratory and injunctive relief such that future C-Tax distributions meet constitutional standards.

DATED this 7th day of August, 2015.

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CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5), and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Office Word in size 14 Times New Roman.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding parts of this brief exempted by NRAP 32(a)(7), it is proportionately spaced, has a typeface of 14 points or more, and contains approximately 3,660 words.

Finally, I hereby certify that to the best of my knowledge, information, and belief, this brief is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires that every assertion in this brief regarding matters in the record be supported by appropriate references to the record on appeal. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 7th day of August, 2015.

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CERTIFICATE OF SERVICE

I hereby certify that on August 7, 2015, I electronically filed the foregoing **APPELLANT'S REPLY BRIEF** with the Clerk of the Court of the Supreme Court of Nevada by using the Court's Electronic Filing System.

I certify that all participants in the case are listed below and are registered electronic filing users and that service will be accomplished by the Court's Electronic Filing System:

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