



**CIRCUIT COURT OF THE STATE OF OREGON**

FOURTH JUDICIAL DISTRICT  
MULTNOMAH COUNTY COURTHOUSE  
1021 S.W. FOURTH AVENUE  
PORTLAND, OR 97204-1123

JOHN A. WITTMAYER  
JUDGE

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**August 14, 2012**

**Mr. Eric Fruits  
4318 NE Royal Court  
Portland, OR 97213**

**Mr. Robert Clark  
3207 SE Brooklyn Street  
Portland, OR 97202**

**Mr. James Van Dyke  
City Attorney  
1221 SW 4<sup>th</sup> Avenue, Room 430  
Portland, OR 97204**

**Re: Eric Fruits v. City Council of the City of Portland, Case No. 1207-08606  
Robert Clark v. City Council of the City of Portland, Case No. 1207-08635**

**Dear Mr. Fruits, Mr. Clark and Mr. Van Dyke:**

On July 30, 2012, these consolidated cases came before the Court for hearing pursuant to ORS 250.296 on Petitioners' challenges to the Ballot Title prepared by Respondent following the adoption of Council Resolution No. 36939. Resolution 36939 refers to the voters for the November 6, 2012 general election a measure to adopt a tax, the proceeds from which will be used to supports arts education in schools and to fund arts programs through grants.

Petitioners challenge the various component parts of the Ballot Title, i.e. the Caption, the Question and the Statement in several respects, asserting that they are "insufficient, not concise or unfair." ORS 250.296(1). Petitioners variously propose alternative wording for the Ballot Title.

ORS 250.035(1) requires that a city ballot title consist of three component parts:

**"(a) A caption of not more than 10 words which reasonably identifies the subject of the measure;**

(b) A question of not more than 20 words which plainly phrases the chief purpose of the measure so that an affirmative response to the question corresponds to an affirmative vote on the measure; and

(c) A concise and impartial statement of not more than 175 words summarizing the measure and its major effect.

Although both Petitioner Fruits and Petitioner Clark challenge the various components of the ballot title, neither Petitioner makes any specific challenge that asserts the various components of the City's proposed ballot title are not "concise." As ORS 250.035(1) sets forth a limit on the number of words that may be contained in the various component parts of a ballot title, and the City's proposed ballot title complies with this limit, I find that the Caption, the Question and the Summary proposed by the City are all in compliance with the requirement law that they be "concise."

#### **The Caption:**

The Caption provided by the City is as follows:

*"Restore School Arts, Music Education; Fund Arts through Limited Tax."*

Petitioner Fruits challenges the City's proposed Caption in several respects, including the following:

- Petitioner Fruits asserts it is misleading in that the use of the word "restore" connotes a sense of completeness or totality, and unless the proposal would completely restore lost funds it is inappropriate to describe it thusly. Petitioner Fruits also asserts that the proposal contains no standard by which such a restoration could be measured.
- Petitioner Fruits asserts the use of the word "limited" to describe the tax is insufficient or unfair because that word is not commonly understood and gives the impression the tax will expire at some future date, whereas it contains no sunset clause.
- Petitioner Fruits objects that the caption fails to say the tax is retroactive to the beginning of 2012.

Petitioner Fruits suggests the caption should read as follows:

*"Creates retroactive, permanent, per capita poll tax on Portland residents."*

Petitioner Clark, likewise, challenges the City's proposed Caption as in violation of ORS 250.296.

#### **The Question:**

The Question provided by the City is as follows:

*"Shall Portland restore arts, music for schools and fund arts through income tax capped at 35 dollars per year?"*

Petitioner Fruits challenges the City's proposed Question on the following grounds:

- Petitioner Fruits objects to the Question's use of "restore," consistent with Petitioner Fruits' challenge to the use of "restore" in the Caption.
- Petitioner Fruits asserts the proposed tax is inconsistent with commonly accepted definitions of an income tax, and instead argues it is a head tax or a poll tax.
- Petitioner Fruits argues that the use of "capped" is misleading for a flat tax of \$35.00, and that it is redundant, and also that it is misleading because of the possibility of future increases.

Petitioner Fruits suggests the following question in place of the City's proposed Question:

*"Shall City of Portland impose retroactive, permanent, per capita poll tax on city residents meeting minimum age and income requirements?"*

Petitioner Clark challenges the City's proposed Question on the following grounds:

- It inaccurately calls it an "income tax" whereas it is a poll tax.
- It is insufficient or unfair because to describe it as "capped" is misleading, because the tax rate is a flat \$35 for every person subject to the tax.

Petitioner Clark suggests three alternatives for the Question:

*"Shall Portland restore arts, music for schools and fund arts through a yearly 35 dollar tax assessed each non-exempt resident?"* or

*"Shall Portland restore arts, music for schools and fund arts through a \$35 tax assessed annually against each non-exempt resident?"* or

*"Shall Portland restore arts, music for schools and fund arts through 35 dollar tax assessed annually against each non-exempt resident?"*

#### **The Statement:**

The Statement summarizing the measure provided by the City is as follows:

*"This measure creates a limited income tax capped at \$35 for each adult income-earning Portland resident. Individuals in households below federal poverty level pay no tax."*

*Tax can only be used for:*

- *Arts and Music Teachers: Funds to hire arts and music teachers for kindergarten through 5<sup>th</sup> grade students at local public schools attended by Portland students. Distribution of funds based on school enrollment.*
- *Arts Access: Remaining funds for grants to nonprofit arts organizations, other nonprofits and schools. Will fund grants to provide high-quality arts access for kindergarten through 12<sup>th</sup> grade students and to make arts, culture experiences available to underserved communities. Funds administered by Regional Arts and Culture Council (RACC).*

*Accountability measures include:*

- *Administrative costs are capped.*
- *Expenditures subject to oversight by citizen committee.*
- *Independent financial audits of RACC and School District expenditures.*

*Estimated funds raised will be \$12 million annually. The tax is effective beginning with 2012 tax year, with payment due when state taxes are due."*

Petitioner Fruits challenges the City's proposed Statement, asserting it is "insufficient, not concise and unfair," in violation of ORS 250.296. Petitioner Fruits suggests the statement summarizing the measure caption should read as follows:

*"If approved by voters, this measure will impose a permanent, \$35 per capita poll tax on all city residents of voting age who meet minimum income thresholds established by the city. The tax is retroactive to January 1, 2012 and has no expiration date. There would be an exemption available based on 100% of the Federal Poverty Guidelines (updated annually) based on family size. 'Income earning adults' would include individuals with wage (W-2) income, self-employment income, rental income, retirement income (including Social Security income) or any other income.*

*The permanent tax shall be known as the Arts Education and Access Income Tax. All monies collected by the tax shall be deposited into the Arts Education and Access Fund, to be administered by city employees.*

*The city estimates the permanent tax will raise approximately \$12 million per year. Net revenues of the fund shall be distributed by the city to local school districts to hire certified arts or music education teachers for K-5 elementary students who reside and attend a public elementary school within city limits."*

Petitioner Clark also challenges the City's proposed Statement, but does not suggest a specific alternative to the City's proposed language.

### **Analysis – general comments:**

There is a dearth of appellate precedent specifically interpreting ORS 250.296 because the parties agree appellate review is not available for challenges to city ballot titles, ORS 250.296(3) (“[t]he review by the Circuit Court shall be the ...final review...”). However, the Court is generally guided by the abundance of Oregon Supreme Court opinions reviewing challenges to state ballot titles. The Court’s role in a ballot title challenge such as the challenges asserted here by Petitioners Fruits and Clark is not to change the ballot title because the Court might be able to write a “better” title, but instead to make changes and certify a different ballot title only if the ballot title proposed by the City is “insufficient, not concise, or unfair.”

#### **The Caption:**

The Caption is not “insufficient, not concise, or unfair.” Petitioner Fruits’ objections to the use of the word “restore” are not well taken. The Court rejects Petitioner Fruits’ asserting that the word “restore” connotes some form of complete restitution of lost funds.

Likewise, Petitioner Fruits’ objection to the use of the word “limited” is unfounded as well. While the word “limited” has many meanings and uses, including limited in duration, it is not unfair or insufficient to use the word to describe the proposed tax is \$35, as the word is used here.

In the very restrictive opportunity to write a caption not to exceed 10 words, it is not insufficient or unfair to not include a reference to the beginning of the tax year. This proposed tax is not retroactive, as is asserted by Petitioner Fruits. If adopted by the voters in November 2012, it will apply to persons with income during 2012.

#### **The Question:**

Both Petitioners assert that the description of the proposed tax in the Question as an “income tax” is insufficient and unfair because in fact the proposed tax is a head tax or a poll tax. The proposed tax at issue here is not a head tax or a poll tax because it is not assessed per capita – it is assessed only upon income-earning individuals age 18 or older in households above the federal poverty guidelines.

As noted above, the City’s proposed Question includes the phrase “tax capped at 35 dollars per year.” Both Petitioners challenge the use of the word “capped,” because no one paying the tax will pay anything less than \$35.00 per year. The City responds that the use of “capped” simply means \$35.00 is the “high point” of the tax.

The Court finds that as used in the Question proposed by the City the word “capped” is both insufficient and unfair, in that in common understanding to have a “cap” implies the possibility the tax may be something less than the “cap.”

The Court will sign an Order, to be prepared by Respondent’s attorney, certifying to the City Elections Officer the following Question in lieu of the Question proposed by the City:

*"Shall Portland restore arts, music for schools and fund arts through income tax of 35 dollars per year?"*

**The Statement:**

The objections of Petitioners Fruits and Clark to the City's proposed Statement largely track their objections to the City's proposed Caption and Summary, noted above.

Additionally, Petitioner Fruits objects to that portion of the City's proposed Statement that provides that tax receipts will be used to provide "high-quality" arts access (the objection is to the use of the words "high quality"). Petitioner Fruits' objections in this regard are not well taken because this phrase accurately describes the City's intended use of the tax receipts.

Petitioner Fruits also objects to the reference to the "federal poverty level" in the City's proposed Statement, arguing that instead "federal poverty guidelines" should be used. The Court finds that the use of the phrase "federal poverty level" in the City's proposed Statement is not insufficient or unfair.

The Court will sign an Order, to be prepared by Respondent's attorney, certifying to the City Elections Officer the following Statement in lieu of the Statement proposed by the City:

*"This measure creates a limited income tax of \$35 for each adult income-earning Portland resident. Individuals in households below federal poverty level pay no tax.*

*Tax can only be used for:*

- *Arts and Music Teachers: Funds to hire arts and music teachers for kindergarten through 5<sup>th</sup> grade students at local public schools attended by Portland students. Distribution of funds based on school enrollment.*
- *Arts Access: Remaining funds for grants to nonprofit arts organizations, other nonprofits and schools. Will fund grants to provide high-quality arts access for kindergarten through 12<sup>th</sup> grade students and to make arts, culture experiences available to underserved communities. Funds administered by Regional Arts and Culture Council (RACC).*

*Accountability measures include:*

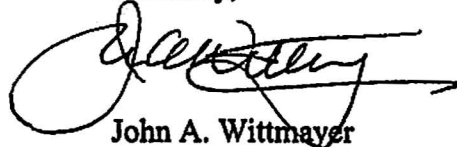
- *Administrative costs are capped.*
- *Expenditures subject to oversight by citizen committee.*
- *Independent financial audits of RACC and School District expenditures.*

*Estimated funds raised will be \$12 million annually. The tax is effective beginning with 2012 tax year, with payment due when state taxes are due."*

**Order:**

**Counsel for Respondent City shall prepare an Order consistent with the foregoing.**

Sincerely,

A handwritten signature in black ink, appearing to read "John A. Wittmayer", written over a horizontal line.

**John A. Wittmayer  
Circuit Court Judge**