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8 **CHERIEL JENSEN**

2017 APR -4 A 2:28

CL. Newson

9 SUPERIOR COURT OF CALIFORNIA

10 COUNTY OF SANTA CLARA

11 **CHERIEL JENSEN,**

12 Plaintiff.

Case No. 17CV304960

13 vs.

PLAINTIFF'S MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO DEMURRER

14 **SANTA CLARA VALLEY**
15 **TRANSPORTATION AUTHORITY,**
16 **and ALL PERSONS INTERESTED**
17 **IN THE MATTER OF THE VALIDITY**
18 **AND/OR LEGALITY OF VTA TAX**
19 **MEASURE B THAT APPEARED ON**

Date: April 20, 2017

Time: 9 a.m.

Dept: 9

Honorable Mary E. Arand

20 Defendants.
21 _____)

22 The complaint, filed by Cheriell Jensen in pro per 60 days after the November
23 8 election (on Monday, January 9 - timely under **CCP Section 12a**) contains
24 three causes of action; defendant VTA has filed a general demurrer to the entire
25 pleading and "each cause of action." Plaintiff addresses each cause of action
26 in reverse order - starting with the cause of action under the Public Records Act.
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1 **THIRD CAUSE OF ACTION - UNDER THE PUBLIC RECORDS ACT**

2 The third cause of action, based on the **California Public Records Act**
3 **(PRA) - Government Code section 6250 et seq.** - alleges that Plaintiff
4 requested a copy of a record from the VTA by email on December 14 (Exhibit 1
5 to the complaint - extra copy attached) and received no response whatsoever.
6 She has brought suit as a member of the public pursuant to **Gov't. Code section**
7 **6258.**

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10 The email asks about “each and every statute(s) which authorized the VTA
11 Board to place Measure B on the November 8, 2016 ballot” and makes “*a*
12 *request for a copy of any public record(s), not exceeding 3 pages, that*
13 *identifies each such statute.*”
14
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16 Since the VTA had placed the measure on the ballot, the agency surely had at
17 least one copy of the statute(s) or a piece of paper identifying the authorizing
18 statute(s), if any. But seemingly, the VTA did not (and does not) want to
19 identify the statutes because the measure is unauthorized by any law.
20

21 On demurrer, the VTA now claims that the request sought a record that did
22 not exist; and that it was being asked to do research and create a record.
23

24 The truth is that the request was not to create a record, although the VTA was
25 free to do so. The request was for any record containing the information sought.
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1 An agency must always use its knowledge of matters - including what records
2 it possesses - in responding. Its records may include laws. See *Cook v. Craig*
3 (1976) 55 CA3d 773, 782 interpreting “public records” as used in the PRA
4 (*Gov’t Code section 6252*) to include rules and regulations of the California
5 Highway Patrol. From the beginning, **Section 6252(e)** has provided that public
6 records include “*any writing containing information relating to the conduct of*
7 *the public’s business prepared, owned, used, or retained by any state or local*
8 *agency regardless of physical form or characteristics.*” A copy of a statute - or
9 a paper which refers to a statute - used or retained by a covered agency is a
10 public record.
11
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14 Under the **PRA (section 6253)**, an agency must provide a prompt response to
15 a written request for a public record that is “*identifiable*” by the agency after its
16 takes up to 10 days to evaluate the request it.
17

18 If the VTA wished to admit it no record sought, it could have so stated in the
19 written response to the request required **Gov’t Code section 6255**. But such a
20 response would have essentially conceded that no statute authorized the measure.
21

22 Members of the public use the state Public Records Act (PRA) to seek
23 information. Expressly in **Gov’t Code section 6250**, the PRA addresses the
24 public’s right of “*access to information concerning the conduct of the people’s*
25 *business...*” Placing Measure B on the ballot (rightly or wrongly) was
26 conducting the people’s business.
27
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1 On demurrer, the VTA does not raise the objection that **Gov't Code section**
2 **6258** permits an action for declaratory and/or injunctive relief, and the complaint
3 does not explicitly state its seeks such relief. If the complaint must otherwise be
4 amended, Plaintiff seeks leave to add to the allegations of the third cause.
5

6 **SECOND CAUSE OF ACTION - ULTRA VIRES**

7 The second cause of action alleges that Measure B is unauthorized by law,
8 invalid and may be so declared and enjoined under the common law doctrine of
9 ultra vires. The cause of action is important only if the first cause of action -
10 employing **Gov't Code section 860, et seq.** as the remedy - does NOT apply.
11

12 Although it well appears that it does apply by virtue of **Gov't Code section**
13 **50077.5**, Plaintiff wishes to maintain the second cause of action which may be
14 done by **judicial notice** of the arguments in support of the demurrer(s) and this
15 response . Together they show the factual basis for declaratory and injunctive
16 relief (in the event **section 860 et seq.** does not apply). If the demurrer to this
17 cause of action were sustained, Plaintiff would expect to seek leave to amend it.
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21 **FIRST CAUSE OF ACTION - INVALIDATION OF VTA TAX MEASURE**

22 The first cause of action is for invalidation of the VTA's November 8 tax
23 measure. It is predicated partly upon **Gov't Code section 860, et seq.** which
24 sometimes allows an interested person to challenge the validity of an government
25 action (here a tax measure). In connection with its demurrer, the VTA takes no
26 position on whether that validation/invalidation process applies.
27
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1 When lodging the complaint, Plaintiff could not know what statute(s) the
2 VTA might be relying upon in proposing the tax. As such, Plaintiff cited in the
3 complaint (paragraph 6) County Counsel's analysis which claimed that "*State*
4 *law requires the VTA to state the specific purposes for which the sales tax*
5 *proceeds will be used, and that the VTA must spend the proceeds of the tax*
6 *only for these purposes*" (first page of Exhibit 2 to the complaint).
7

8
9 County Counsel identified no particular state law(s); however, the language
10 used in the analysis suggests that County Counsel thought, as Plaintiff now
11 contends, that the VTA's proposed retail transactions and use tax is also
12 governed by **Gov't Code section 50075.1** which provides as follows:
13

14 On and after January 1, 2001, any local special tax measure that is subject to
15 voter approval that would provide for the imposition of a special tax by a local
16 agency shall provide accountability measures that include, but are not limited to,
17 all of the following:

- 18 (a) A statement indicating the specific purposes of the special tax.
19 (b) A requirement that the proceeds be applied only to the specific purposes
20 identified pursuant to subdivision (a).
21 (c) The creation of an account into which proceed shall be deposited.
22 (d) An annual report pursuant to Section 50075.3.
23 (Added by Stats. 2000, Ch.535 (SB 165) in effect January 1, 2001.)

24 The first cause of action explains starting with its paragraph 7:

25 7. An examination of the text of Measure B reveals that it begins by
26 expressing some purposes but then provides that: "*If approved by a 3/4 majority*
27 *of the VTA Board of Directors...VTA may modify the Program for any prudent*
28 *purpose, including to...*".

1 8. If, as it appears, the VTA could, under the language of Measure B, switch
2 its use of proceeds to "*any prudent purpose*," the measure does not confine the
3 VTA's use of the tax proceeds for any specific purposes, and the measure is
unauthorized by the State law summarized in the "impartial analysis."

4 9. Since neither County Counsel in the "impartial analysis" nor the VTA has
5 disclosed (to me) the legal basis for the measure, I allege more broadly (than
6 above) that the measure is unauthorized by law.

7 10. With regard to the possibility of severing part of Measure B so that it does
8 not conflict with the enabling law (if any), it is noted that the measure contains no
9 severability clause. There is no telling whether Measure B would have received
10 the required two-thirds voter approval without the provision allowing the shifting
of the use of proceeds cited above.

11 The VTA does not even mention **Section 50075.1** in connection with its
12 demurrer - even though the section has been cited repeatedly in more recent ex
13 parte applications from Plaintiff's counsel.

14 As to the language of Measure B, the VTA's supporting memorandum admits
15 that it does not limit the agency's use of the tax proceeds to any specific
16 purposes(s) and is only limited to a "*panaply of purposes the special district can*
17 *serve*" (quotation from page 8, lines 21-22). The VTA further admits in its
18 memorandum that "*the list of other 'prudent purposes'* (to which tax proceeds
19 could be shifted under Measure B) is "*by no means exclusive*" (page 11,
20 quotation from line 23). The ability of the VTA (Board) to shift tax proceeds to
21 "*any prudent purpose*" renders the measure invalid under **section 50075.1**.
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1 In its supporting memorandum, the VTA states only that **Gov't Code section**
2 **53724** applies (page 11). That section requires that a proposed "special tax"
3 shall include "*the purpose or service for which its imposition is sought*" (sub-
4 section (a)) and then provides in sub-section (e) that "*(t)he revenues from any*
5 *special tax shall be used only for the purpose or service for which it was*
6 *imposed, and for no other purpose whatsoever.*"
7
8

9
10 Moreover, even if somehow only the restriction in **Gov't Code section 53724**
11 applied, the ability under the measure for the VTA (Board) to shift tax proceeds
12 to "**any prudent purpose**" renders it unauthorized by that code section. Even
13 under **section 53724**, the "**purpose**" must be stated, and the word "**prudent**"
14 would never operate to limit the purpose(s) to which the money could be put.
15 Certainly, "**prudent**" is not a specific purpose under section **50075.1**.
16
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18 It does not matter whether some proponents in some campaign pieces or
19 letters may have warned some voters that tax proceeds could be shifted to any
20 "prudent purpose" or that County Counsel failed to warn voters of that provision
21 in the "impartial analysis" presented as part of the ballot pamphlet (Exhibit 2 to
22 the complaint).. The measure - with the provision - was unauthorized by law and
23 must be declared invalid. The offending language in the measure cannot be
24 severed because, as the complaint alleges, there is no severability clause and
25
26
27 "(t)here is no telling whether Measure B would have received the required two-
28

1 thirds voter approval without the provision..." (quotation from paragraph 10).

2 The VTA will still be free to place a lawful measure on a future ballot.
3

4
5 **CONCUSION**

6 The demurrer to the complaint and to each of the three causes of actions
7 should be overruled. In the event any demurrer is sustained, Plaintiff may seek
8 leave to amend (depending on the Court's explanation).
9

10 Note that no other person or entity joined the case in response to the
11 published summons, and that there should be a trial setting conference set for
12 May 2, 2017 (on the day first set for the initial CMC).
13

14
15 Date: April 3, 2017.

Respectfully submitted,

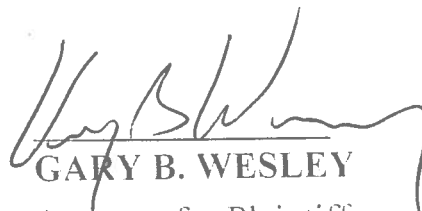
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17 
18 **GARY B. WESLEY**
19 Attorney for Plaintiff
20 **CHERIEL JENSEN**
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EXHIBIT 1

Subject: California Public Records Act Request, December 14, 2016
From: Cheriel Jensen (cherielj@earthlink.net)
To: board.secretary@vta.org;
Date: Wednesday, December 14, 2016 11:07 AM

December 14, 2016

VTA Board Secretary
VTA
board.secretary@vta.org

Dear VTA Board Secretary,

California Public Records Act Request, December 14, 2016

Please provide each and every statute(s) which authorized the VTA Board to place Measure B on the November 8, 2016 ballot. I hereby ask the question phrased as a request for a copy of any public record(s), not exceeding 3 pages, that identifies each such statute. You may simply write me an email containing the information. Please respond by email.

My email address is:
cherielj@earthlink.net

Yours truly,

Cheriel Jensen
My mailing address is:
13737 Quito Road, Saratoga 95370

CERTIFICATE OF SERVICE BY PERSONAL DELIVERY

The undersigned certifies that he is an active member of the California State Bar, not a party to this case and served the foregoing

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PLAINTIFF'S MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEMURRER

SUPERIOR COURT OF SANTA CLARA COUNTY
L. Nguyen

by placing a true copy thereof in an envelope addressed to Defendant VTA's counsel as shown below and delivering it to the address shown on the envelope during regular business hours on April 3, 2017.

Robert Fabela, General Counsel
Evelynn N. Tran, Deputy General Counsel
J. Carlos Orellana, Senior Assistant Counsel
Santa Clara Valley Transportation Authority
3331 North First Street, C-2
San Jose, California 95134

Executed on April 3, 2017 in Santa Clara County, California.

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