

CAUSE NO. D-1-GN-11-001857

RICHARD VIKTORIN, DR. EWA SIWAK, §	IN THE DISTRICT COURT OF
AND RICHARD FRANKLIN III §	
Plaintiffs §	
V. §	TRAVIS COUNTY
THE HONORABLE SUSAN COMBS, §	
COMPTROLLER §	
Defendant §	_____ JUDICIAL DISTRICT

**ORIGINAL PETITION FOR DECLARATORY JUDGMENT
AND ANCILLARY INJUNCTIVE RELIEF**

A. Summary of the Case

1. “When taxes are imposed for private purposes, they cease to be taxation and become plunder.” *Hendee v. Dewhurst*, 228 S.W.3d 354, 379 at FN32 (Tex. App.—Austin 2007 *pet. denied*). This lawsuit seeks to prevent the unlawful plunder of public funds for promoters of a Formula One race at a time when the State of Texas claims it cannot afford to adequately fund essential services, such as its public education system. Had the Texas Legislature in fact made the policy decision to place a race event above other expenditures, the public’s remedy would be in the election process. The Texas Legislature, however, has the prescribed conditions for the proposed expenditure of 25 million dollars in public funds – conditions the Defendant Texas State Comptroller Susan Combs has not met. This is a case to enjoin Defendant Texas State Comptroller Susan Combs from taking *ultra vires* action—action that she is not authorized to take in this manner and at this time. Discovery will be conducted under Level 2 of Texas Rule of Civil Procedure.

2. By letter dated May 10, 2010, the Comptroller committed to make an unlawful, *advance* payment of \$25 million of public funds to private promoters of a Formula One race, no later than July 31, 2011, before an official race date is even set, a prerequisite under Article 5190.14 the

“Major Events Trust Fund” (METF) statute. (Exhibit P-1) Worse, the law requires that to be eligible for public funds, the promoters of the Formula One race must have conducted a “highly competitive selection process” in which an “endorsing” city or county competed. No such “competitive process” occurred here. Formula One completed its site-selection process without asking for or receiving any kind of offer or commitment whatsoever from Austin or Travis County officials for the tax “incentives” the Comptroller is now set to give them. Finally, the Comptroller has no authority to disburse public funds, as “certified” in the Comptroller’s letter of May 10, 2010, from the Major Event Trust Fund to “Formula One World Championship Limited” because that entity is not a “site selection organization” authorized to receive funds under Art. 5190.14, Section 5A.

3. Under these circumstances, public funds are not being used for the public purpose of tax *incentives* offered during a site-selection process to *induce* promoters to locate the F1 race here; instead, offering public funds after the site selection has been made is an illegal gift for private purpose. Plaintiffs are state and local taxpayers, residents of Travis County, Texas who are exercising their right as taxpayers to seek declarations and injunctive relief to stop the illegal expenditure of public funds by the Comptroller.

B. Parties

4. a. Plaintiff Richard Viktorin is a state and local taxpayer who owns property and resides in Austin, Travis County, Texas. In addition, Mr. Viktorin operates Audits in the Public Interest. Mr. Viktorin may be served through his attorney of record in this case.

b. Plaintiff Dr. Ewa Siwak is a state and local taxpayer who owns property and resides in Austin, Travis County, Texas and pays fees to the State for her teacher certification. In addition, Dr. Sivak is an Austin ISD teacher whose 3-year contract was cancelled as a result of

reduction in funds for public education. Dr. Sivak may be served through her attorney of record in this case.

c. Plaintiff Richard Franklin III is a state and local taxpayer who owns property and resides in Travis County, Texas and pays fees to the State of Texas for his insurance license. In addition, Mr. Franklin is a member of the Del Valle ISD School Board. Mr. Franklin may be served through his attorney of record in this case.

5. Defendant, The Honorable Susan Combs, is sued in her official capacity as Texas Comptroller of Public Accounts, and she can be served at The Lyndon B. Johnson Building, 111 E. 17th Street, Austin, Austin, Texas 78701.

C. Jurisdiction & Venue

6. The claims in this suit are within the jurisdiction of this Court to issue declarations and writs when taxpayers seek to enjoin the unlawful expenditure of public funds. *Bland I.S.D. v. Blue*, 34 S.W.3d 547, 555-56 (Tex. 2000) (In Texas, taxpayers have “taxpayer standing” to enjoin the illegal expenditure of public funds, even without showing a distinct injury); *Hendee v. Dewhurst*, 228 S.W.3d 354 (Tex. App.—Austin 2007 *pet. denied*). Venue is proper in this Court because the Defendant’s office is located in Travis County and Defendant is a statewide official.

D. Facts

7. In 2009, the Texas Legislature passed S.B. 1515, enacted as Art. 5190.14, Section 5A, which created a funding mechanism, the Major Events Trust Fund (METF), for the stated purpose to “provide assurances required by a site selection organization sponsoring an ... event and to provide financing for the costs of: (1) applying or bidding for selection as the site of a game or event in this state; (2) making the preparations necessary and desirable for the conduct of a game or event in this state []; and (3) conducting a game or event in this state.”

8. The Act (hereafter, the “METF statute”) defines an “event” to include “a Formula One automobile race” and defines “site selection organization” to include, by name, “Formula One Management Limited” (FOML) or “the Federation Internationale de l’Automobile” (FIA). As of the date this lawsuit was prepared, neither FOML nor FIA are registered to do business in Texas.

9. The METF statute provides a method of diverting both local and state sales tax, alcoholic beverage tax, and hotel occupancy tax revenue to be deposited to the METF for payments to the FOML or FIA. The state portion is limited to 6.25 times the amount of local revenue retained or remitted by an “endorsing” city or county.

10. Also in 2009, the Legislature made a contingent appropriation of \$25 million out of the state’s general fund to be transferred to the METF “for the purpose of attracting and securing eligible events.” The appropriation was made contingent on (1) a written statement from the Governor and State Comptroller confirming the state’s interest in the event, (2) certification by the Comptroller that sufficient revenues would be generated by the event to offset the amount appropriated, (3) an agreement with one or more “endorsing” cities or counties under the terms of the METF provision for advance payment to the event promoters, and (4) receipt by the Comptroller of local funds from the endorsing city or county under the terms of the METF statute.

11. In addition, under the express terms of the METF statute, an event, including a Formula One race, is only eligible for public funding if the site selection is conducted through “a highly competitive selection process.” The purpose for this requirement is self-evident – if the process is not competitive, tax incentives would not be necessary. There was no highly competitive selection process here.

12. There was no “process” used in which local governments of Austin or Travis County

were even asked by Formula One officials to compete, nor did the local governments otherwise compete in any process to have Austin or Travis County selected as the site. Neither the City of Austin nor Travis County “endorsed” the Formula One project before the “highly competitive selection process” ended and the site selection was publicly announced. In fact, Austin Council member Randi Shade, was quoted in the Austin Chronicle on June 3, 2011 as saying, “The city [of Austin] did nothing to recruit F1 to Austin. We did not take any action, as far as I know, to encourage, facilitate, or drive those people to choose Austin as their site.”

13. Public records show that the first meeting between the State Comptroller and the Mayor of Austin and City staff to receive a briefing about the Formula One race occurred on May 17, 2010. No public record has been found of such a meeting with Travis County officials prior to the public announcement that FOML and FIA had selected a site in Travis County, outside the City limits of Austin, for a Formula One race in 2012.

14. A week prior to that meeting between the Comptroller and Austin officials, the Comptroller signed a letter dated May 10, 2010 addressed to “Formula One World Championship Limited” which is not a “site selection organization” named as eligible for public funding under the METF statute. (Exhibit P-1) The letter was addressed to the attention of “Mr. Ecclestone” and said:

Dear Sirs:

In response to the requirements of the race promotion contract for the Formula 1 United States Grand Prix in Texas, I hereby certify the following:

With the understanding that the first Formula 1 United States Grand Prix race will be held in Texas in 2012, full funding of the entire sanction for 2012 will be paid to Formula One World Championship Limited (“FOWC”) no later than July 31, 2011.

In subsequent years, two through ten, of the race promotion contract, i.e., 2013 through 2021, we will be sending \$25 million dollars to FOWC by the end of July

31st of each year preceding the actual race.

We look forward with great enthusiasm to this event and a successful mutually beneficial relationship for many years to come.

[signed]
Susan Combs
Texas Comptroller of Public Accounts.

(Exhibit P-1 emphasis added).

15. The Comptroller's letter was not premised on, and did not mention, (1) the date of any Formula One race in Texas, nor (2) any endorsement of the event or competition by any "endorsing" Texas city or county to compete for the site location.

16. On May 12, 2010, just two days after the Comptroller's letter (and before the May 17th meeting with Austin officials) race promotion lobbyist Tavo Hellmund received an email from the FOML's lead counsel congratulating him on Austin being selected as the site for the Formula One race. On May 16, 2010, Tavo Hellmund sent an email that was disclosed, under an open records request, as having been received by the Comptroller's Office that said, in part, "[FOML CEO] Mr. Ecclestone would be making the announcement (this weekend in Monte Carlo) of the new official 10 year contract for the FIA Formula 1 United States Grand Prix in Austin."

17. Without having received any offer for METF public funding from local governments, FOML and FIA announced publicly on May 25, 2012 that Austin had been selected as the site for the Formula One race.

18. The amount of public funds that the Comptroller can remit to the METF is determined by a process laid out in the METF statute. This includes money transferred from the contingent appropriation from the General Fund and estimated incremental increases in sales, alcohol, or hotel tax (state and local). The METF statute says in section 5A (b):

(b) "*If* a site selection organization selects a site for an event in this state *pursuant*

to an application by a local organizing committee, endorsing municipality, or endorsing county, upon request of a local organizing committee, endorsing municipality, or endorsing county, the comptroller shall determine for a one-year period that begins two months before the date on which the event will begin, in accordance with procedures developed by the comptroller:

(1) the *incremental* increase in receipts to the state from taxes [sales, alcohol, hotel] within the market areas designated under Subsection (c) of this section, that is *directly* attributable, as determined by the comptroller, to the preparation for and presentation of the event and related activities....

(emphasis added). The statute provides that the Comptroller will likewise estimate the “incremental increase” in local taxes from each “endorsing” city or county that are “directly attributable” to the event.

19. The Comptroller’s incremental tax estimating process determines how much public money is to be deposited to the METF and, therefore, made available for payment to the FOML or FIA.

20. But the METF statute circumscribes the timing of *when* this estimating process can begin and *when* the Comptroller can transfer funds, up to the \$25 million appropriation, to the METF. Section (b-1 says, in part, “A request for a determination of the amount of incremental increase in tax receipts specified in Subsection (b) of this section must be submitted to the comptroller *not earlier than one year* and not later than three months before the date the event begins.” And subsection (r) restricts the time at which the Comptroller can deposit the \$25 million appropriation from the General Fund into the METF to being “[i]n the 12 months immediately preceding the event....” That Subsection (r) permits public money to be paid to the FOML or FIA “before the event” under certain circumstances; circumstances that can only be met if the race date is *officially set* less than one year from the date such payment is made.

21. While these statutory restrictions on the Comptroller’s authority are based on the date of the Formula One race, that date has not been officially set by the governing entity, the FIA’s

World Motor Sport Council. While the FOML made a public announcement in early June 2011 that the Austin race would be held on June 17, 2012, the *Austin American-Statesman* reported on June 3, 2011 that the FIA Senate President, Nick Crow, said in an email “This [June 17, 2012] is the *proposed* date. The date won’t be final until the September or December WMSC [World Motor Sport Council] meeting. A fall date is, therefore, possible, which would possibly offer cooler weather.” (Austin American-Statesman, “F1 sets June 17, 2012 as tentative Austin race date” June 3, 2011, emphasis added).

22. As further indication that the race date is not officially set, FOML CEO Ecclestone sent a letter dated May 11, 2011 to Mayor of Austin Lee Leffingwell (strangely not received until June 1, 2011) saying, “We anticipate the first event to be held in June 2012 at the Circuit of the Americas.”¹ (emphasis added).

23. The absence of any public records from the Comptroller also confirms that the Comptroller had no confirmation of any official race date having been set prior to sending her May 10, 2010 letter. The race date at this point is simply the desire of the race promoters, who hope the official Formula One entity will confirm their selection. Without an official race date, however, no funds can be advanced under Article 5190.14.

24. Despite the fact that there is no official race date—and Austin did not take any prior action to compete for the location of the Formula One race in advance of the announcement of the informal site selection—the Austin City Council has initiated a process to pave the way for Formula One promoters to receive tax money—after the fact—as if the METF statute is applicable. By doing so, the City Council risks approval of contracts that may be void or wholly unfundable because the Comptroller lacks authority to make a gift of public funds at this time, or arguably ever, to a private organization (FOML or FIA).

¹ Circuit of the Americas is the site near Elroy, Texas where the race track has been under construction.

25. As part of that extra-legal process in which the City Council is presently engaged, a “local organizing committee”—anticipating designation by the City Council this week—released a privately-prepared estimate of the tax revenue for which the Formula One race would be credited, resulting in payment by the Comptroller to the FOML or FIA. The estimate, by Dr. Don Hoyte, grossly exaggerated the amount of revenue that could be paid to FOML or FIA by ignoring the MEFT statutory requirement that such estimates include only the “incremental” increase in revenue that is “directly” attributable to the event. To comply with the statute, the estimate must first estimate the baseline tax revenue that would occur in Austin and the “market area” without the Formula One being considered. Then, only any “incremental” increase above that baseline tax revenue estimate may be credited to the direct effect of having the race here. Dr. Hoyte also included “indirect” and “induced” increases in taxes, ignoring the statutory restriction to credit only tax increases that were “directly” attributable to the event.

26. The estimating technique used by Dr. Hoyte makes the unauthorized and unsupportable assumption that FOML or FIA should be credited with tax revenue from the event assuming that, without the race, Austin would be a ghost town with no hotel rooms rented or bars and restaurants with customers. The Hoyte estimate did not use the statutory standard required by the METF statute, nor did the report indicate what date of the race was assumed in preparing the estimate. As a result, if the Comptroller elects to rely on that report, she will be violating the standard applicable under Article 5190.14.

E. Claims for Declaratory Judgment and Ancillary Injunctive Relief

27. Plaintiffs ask the Court to make the following declarations pursuant to Tex. Civ. Prac. & Rem. Code Chapter 37:

a. That, until a date for the 2012 Formula One race in Travis County is officially

approved by the FIA World Motor Sports Council, and less than one year remains before that official race date:

(1) The Comptroller lacks authority to perform the estimation of incremental increases in state or local tax revenues directly attributable to the Formula One race (Art. 5190.14, Section 5A(b));

(2) The Comptroller lacks authority to accept a request for determination of the incremental increase in state or local tax revenues directly attributable to the Formula One race (Art. 5190.14, Section 5A(b-1));

(3) The Comptroller lacks authority to transfer the contingent appropriation of \$25 million from the State's general fund to the METF (Art. 5190.14, Section 5A(r)); and

(4) The Comptroller lacks authority to make disbursements from the METF related to the Formula One race event ((Art. 5190.14, Section 5A(r)).

b. Because neither the City of Austin, Travis County, nor any other local government submitted an application to the FOML or the FIA to compete for the location of the Formula One race in advance of the decision to hold the F1 race here, there was no "highly competitive selection process." Therefore, the METF statute has not been invoked, and the Comptroller lacks any authority to transfer the \$25 million from the General Fund, to establish the METF trust fund, or to make any payment of public funds from the METF related to the Formula One race event before or after the event.

c. That the METF statute, Subsection (b) is properly interpreted to require that the estimate of tax revenue performed by the Comptroller to first estimate a baseline—without consideration of the Formula One race event—of state and local revenue of tax revenue expected to be collected in Austin and the designated market area, and then credit only the "incremental

increase” in revenue above the baseline as being attributable to the Formula One race event.

d. That the METF statute, Subsection (b) is properly interpreted to require that the estimate of tax revenue performed by the Comptroller must be limited to the incremental increase in state and local tax revenue that is *directly* attributable to the Formula One race event, and excludes any “indirect” tax revenue or “induced” tax revenue.

e. That the Comptroller lacks authority to disburse amounts METF funds to FOML or FIA that were not calculated as indicated in the declarations requested in (c) and (d) above.

f. The Comptroller has no authority to disburse public funds, as “certified” in the Comptroller’s letter of May 10, 2010, from the Major Event Trust Fund to “Formula One World Championship Limited” because that entity is not a “site selection organization” authorized to receive funds under Art. 5190.14, Section 5A.

28. Plaintiffs expect the Comptroller will abide by the Court’s declarations as requested above, but in the event the Comptroller threatens or fails to comply with such declarations, Plaintiffs will ask the Court to issue appropriate writs to enjoin the Comptroller from making illegal expenditures of public funds as pled in this cause of action.

PRAYER

For these reasons, Plaintiffs ask that the court issue citation to Defendant, The Honorable Susan Combs, Comptroller, to appear and answer, and that the Court grant the requests for declaratory judgment requested above and grant Plaintiffs ancillary injunctive relief as necessary to give effect to the Court’s declarations, and grant all other relief to which Plaintiffs are entitled.

Respectfully submitted,

A handwritten signature in cursive script that reads "Bill Aleshire". The signature is written in black ink and is positioned above the typed name.

Bill Aleshire

State Bar No. 24031810

Jennifer S. Riggs

State Bar No. 16922300

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TEXAS COMPTROLLER *of* PUBLIC ACCOUNTS

S * U * S * A * N
C * O * M * B * S

May 10, 2010

Formula One World Championship Limited
6 Princes Gate
London SW7 1QJ
England
Attn: Mr. Ecclestone

Dear Sirs:

In response to the requirements of the race promotion contract for the Formula 1 United States Grand Prix in Texas, I hereby certify the following:

With the understanding that the first Formula 1 United States Grand Prix race will be held in Texas in 2012, full funding of the entire sanction for 2012 will be paid to Formula One World Championship Limited ("FOWC") no later than July 31st, 2011.

In subsequent years, two through ten, of the race promotion contract, i.e. 2013 through 2021, we will be sending \$25 million dollars to FOWC by the end of July 31st of each year preceding the actual race event.

We look forward with great enthusiasm to this event and a successful mutually beneficial relationship for many years to come.

Sincerely,



Susan Combs
Texas Comptroller of Public Accounts

