No. 81995-5

SANDERS, J. (dissenting)—Between 1996 and 2000, the city of Tacoma collected $853,722.55 in natural gas use taxes from G-P Gypsum Corporation (Gypsum), a corporation that manufactures wallboard within the city limits. The question before us is whether Tacoma's local tax for natural gas use applies to Gypsum, even though Gypsum first used its natural gas outside the city's boundaries. Because the plain language of the tax statutes compels us to affirm the Court of Appeals, I dissent. *See G-P Gypsum Corp. v. Dep't of Revenue*, 144 Wn. App. 664, 183 P.3d 1109 (2008), *review granted*, 165 Wn.2d 1023, 203 P.3d 380 (2009).

This matter turns on statutory construction. Our "fundamental objective in construing a statute is to ascertain and carry out the legislature's intent." *Arborwood Idaho, LLC v. City of Kennewick,* 151 Wn.2d 359, 367, 89 P.3d 217 (2004). We first look to the plain language of a statute. *State v. Armendariz,* 160 Wn.2d 106, 110, 156 P.3d 201 (2007). If the plain language is subject to only one interpretation, our inquiry is at an end. *Id.* When a "'statute's meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.'" *Tingey v. Haisch*, 159 Wn.2d 652, 657, 152 P.3d 1020 (2007) (quoting S*tate v. Jacobs,* 154 Wn.2d 596, 600, 115 P.3d 281 (2005)). If the statute remains subject to multiple interpretations after analyzing the plain language, it is ambiguous. *Armendariz,* 160

Wn.2d at 110. "A statute is ambiguous only if susceptible to two or more reasonable interpretations, but a statute is not ambiguous merely because different interpretations are conceivable." *Burton v. Lehman*, 153 Wn.2d 416, 423, 103 P.3d 1230 (2005). Only if a statute is ambiguous may we look to the legislative history and the circumstances surrounding the statute's enactment to discern legislative intent. *Rest. Dev., Inc. v. Cananwill, Inc.,* 150 Wn.2d 674, 682, 80 P.3d 598 (2003).

Cities may "fix and impose on every person a use tax for the privilege of using natural gas or manufactured gas in the city as a consumer." RCW 82.14.230(1). Here the legislature defined "use" as follows:

> "Use," "used," "using," or "put to use" shall have their ordinary meaning, and shall mean the *first act* within this state by which the taxpayer *takes or assumes dominion or control* over the article of tangible personal property (as a consumer), and include installation, storage, withdrawal from storage, or any other act preparatory to subsequent actual use or consumption within this state.

Former RCW 82.12.010(2) (1994) (emphasis added). Former RCW 82.14.020(7) (1983), in turn, suggests that "[t]he meaning ascribed to words and phrases in . . . 82.12 RCW, as now or hereafter amended, insofar as applicable, shall have full force and effect with respect to taxes imposed under authority of this chapter."

The majority notes that Gypsum first uses gas at points outside the city of Sumner or Sumas, where it imports the gas from out of state. Majority at 2. "Gypsum exercises dominion and control over the gas [i.e., uses the gas] when it reaches the

stations." *Id*. The majority nonetheless asserts that the definition of former RCW 82.12.010(2) does not apply. It tries to reconcile the problems with this position by misconstruing three words in former RCW 82.14.020(7): "insofar as applicable." Majority at 8. The majority latches onto this phrase the same way a drowning sailor latches onto even the smallest piece of flotsam—desperately.

Unfortunately, these three words do not impact the analysis. They are a distraction only. The dictionary defines "applicable" to mean "capable of being applied **:** having relevance" and "fit, suitable, or right to be applied **:** appropriate." Webster's Third New International Dictionary 105 (2002). It is synonymous with "relevant." *Id*.

Accordingly the phrase "insofar as applicable" means the use statute has "full force and effect" if the "words and phrases" are "relevant" to the subject matter. Former RCW 82.14.020(7). Former RCW 82.12.010(2) is squarely relevant here. It is undisputed that Gypsum's first act of dominion or control over the natural gas within Washington occurs near Sumner or Sumas. By the plain meaning of the statute, then, Gypsum's first act of using natural gas within the state occurs outside Tacoma's boundaries.

The plain language of the statute leaves no wiggle room. It certainly does not permit the gaping breach created by the majority today. The majority rewrites the statutes to meet its interpretation of legislative intent but, in doing so, alters the

statutes so drastically that they no longer achieve what they say. In fact, if followed to its logical end, the majority's contortion of these three words swallows the statute entirely. While on these facts Gypsum does not take control in a city, it is eminently conceivable that consumers could take delivery of natural gas in one city and consume it in another. The majority's interpretation of "use" sets cities on a collision course. Let us assume Gypsum took delivery in another city. What if the city where the gas was delivered imposed a use tax as well? Would Tacoma's tax trump the others? Would both taxes prevail? If so Gypsum would be double-taxed for its "consumption" in Tacoma and its "dominion or control" at the point of delivery—both "uses." *See* RCW 82.14.230(1); former RCW 82.12.010(2). The majority's approach is unsustainable because it dismantles the notion of first use, which is the crux here.

This case is much simpler than the majority makes it. Gypsum's use of natural gas, i.e., its "first act within this state by which the taxpayer takes or assumes dominion or control," occurs outside Sumner or Sumas. The majority goes out of its way to protect Tacoma's tax-revenue stream when the statutes favor points of first use. In most cases, points of first use will occur where the natural gas is consumed.[1] But in

[1] The majority's public policy argument on this point is misguided. It asserts: "If we were to apply the disputed portion of the definitional statute to Gypsum's activities, then *every* purchaser of natural gas could simply avoid a local tax by purchasing gas [outside Tacoma]." Majority at 10 (emphasis added). Typical purchasers, however, have neither the means nor the incentive to "avoid" the local tax. As Gypsum correctly notes, "it is easier for most taxpayers to take delivery where the gas is actually burned. Gypsum expends significant effort and incurs substantial risks to take delivery outside Tacoma." Answer at 2 (citation omitted). I note, as well, that the record suggests Gypsum did not

cases like Gypsum's, where the corporation assumes dominion or control outside Tacoma, another city could reap the use tax revenue. On these facts Gypsum's first use occurs outside Tacoma. The city's collection of use taxes, accordingly, cannot stand.

The plain language of the statutes is subject to only one interpretation. The statutes are unambiguous. "Use" is plainly defined, and the statute incorporating that definition is relevant to our analysis. Because the plain language is subject to only one interpretation, our inquiry is at an end. *Armendariz,* 160 Wn.2d at 110. The majority's in-depth analysis of legislative history is erroneous and unnecessary.

I would affirm the Court of Appeals and remand for the entry of a judgment refunding the $853,722.55 that Tacoma collected from Gypsum.

take delivery outside Tacoma to "avoid" the city's use tax; it did so for supply reasons. *Id*. (citing Verbatim Report of Proceedings (Oct. 16, 2006) at 20-23).

I dissent.

AUTHOR:
Justice Richard B. Sanders

WE CONCUR:

Justice Charles W. Johnson

Justice Gerry L. Alexander

Justice James M. Johnson