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No. 93788-5

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IN THE SUPREME COURT  
STATE OF WASHINGTON

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CITY OF SPOKANE, a municipal corporation,

Petitioner,

v.

VICKI HORTON, Spokane County Assessor, ROB CHASE, Spokane  
County Treasurer,

and

THE STATE OF WASHINGTON, by and through the Department of  
Revenue,

Respondents.

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PETITIONER'S RESPONSE TO DEPARTMENT OF REVENUE'S  
MOTION TO STRIKE PETITIONER'S CONSOLIDATED REPLY

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Attorneys for Petitioner  
Laura D. McAloon, WSBA #31164  
James A. McPhee, WSBA #26323  
John T. Drake, WSBA #44314  
Witherspoon Brajcich McPhee, PLLC  
601 West Main Avenue, Suite 714  
Spokane, Washington 99201  
Telephone: (509) 455-9077

 ORIGINAL

Petitioner City of Spokane (“City”), through counsel, submits the following response to Respondent Department of Revenue’s (“DOR”) Motion to Strike Petitioner’s Consolidated Reply. This response is supported by the Declaration of John T. Drake (“Drake Decl.”), filed herewith.

### I. ARGUMENT

The Court should deny DOR’s motion to strike the City’s Reply. The Reply is narrowly tailored to the two new issues raised in DOR’s Answer: (1) whether RCW 35A.11.020 prohibits the City from granting local property tax exemptions *independent* of any restrictions that may or may not be imposed by the Washington Constitution; and (2) whether the Court should account for hypothetical impacts upon DOR’s ability to administer the property tax system when deciding whether to accept review. As set forth in the City’s Reply, and as explained in further detail below, both are entirely new issues to which RAP 13.4(d) allows a reply.

**A. RAP 13.4(d) allows reply arguments in response to new issues raised in an answer, even if the answering party does not affirmatively seek review of those issues.**

DOR argues that RAP 13.4(d) only allows reply arguments in response to “new issues” on which the answering party has affirmatively sought review. *See* Motion at 2. DOR has misstated the law. As set forth in the City’s Reply (Reply at 3), this Court’s cases applying RAP 13.4(d)

support the filing of a reply in response to any new issues that are fairly raised in an answer, even if the answering party did not affirmatively request review of those issues. The decision in *Blaney v. International Association of Machinists and Aerospace Workers, District No. 160*, is instructive. There, the Court explained:

The District also asserts that Ms. Blaney may not argue that the jury instruction was proper because she “did not file a cross-petition for review or otherwise affirmatively seek review before this Court on that issue.” [citation omitted]. RAP 13.4(d) and 13.7(b) do not require Ms. Blaney to “file a cross-petition ... or ... affirmatively seek review.” The rules merely require that the issue be raised. The issue was raised in a lengthy footnote to Ms. Blaney’s answer, as well as in repeated references to the erroneous nature of the jury instruction in the District’s petition for review.

*Blaney*, 151 Wn.2d at 210 n.3 (emphasis added).

*Blaney* forecloses any argument that issues raised in an answer must be expressly designated for review in order to qualify as “new issues” within the meaning of RAP 13.4(d). The rule “merely require[s] that the issue be raised.” *Blaney*, 151 Wn.2d at 210 n.3. Once raised, the issue is before the Court and may be addressed by the petitioning party in a reply. See *Chevron U.S.A., Inc. v. Puget Sound Growth Mgmt. Hearings Bd.*, 156 Wn.2d 131, 139 n.6 (2005) (denying motion to strike portion of reply brief addressing new issue that had not been designated for review).

Tellingly, DOR made no effort to address *Blaney* and *Chevron* in its motion. In fact, DOR did not cite any cases at all.<sup>1</sup> The Court should deny the motion on that basis alone.

**B. DOR raised the new issue of whether RCW 35A.11.020 poses an independent barrier to the City's Ordinance.**

The City's Petition seeks review of two distinct issues: (1) whether *Town of Tekoa v. Reilly*, 47 Wash. 202 (1907), has been silently overruled; and (2) whether the City has the authority to grant local property tax exemptions under Article VII, Section 10 of the Washington Constitution. Petition at 1. The City framed the second issue as a question of *constitutional* authority rather than statutory authority, a departure from the position the City argued in the trial court and the Court of Appeals. In the lower courts, the City contended that its exemption power was derived primarily from RCW 35A.11.020, which grants first-class charter cities "all

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<sup>1</sup> Upon being served with the motion, the City observed that DOR had apparently not reviewed the applicable case law. Counsel for the City contacted counsel for DOR and referred him to the *Blaney* and *Chevron* cases cited in the City's Reply. Drake Decl., ¶ 5. Counsel for DOR responded that DOR had reviewed the cases and stood by its position that no reply was authorized. Drake Decl., ¶ 5. The City then requested an opportunity to "meet and confer" with a view toward discussing whether the motion comported with counsel's ethical obligation to disclose adverse authorities and whether proceeding with the motion was an appropriate use of taxpayer and judicial resources. Drake Decl., ¶ 6. Counsel for DOR responded, "I will give you five minutes at 1:30 pm today to call and try to convince me." Drake Decl., ¶ 6. The brief ensuing call between counsel was not productive.

powers of taxation for local purposes.” DOR and Respondents Horton and Chase (“County”) maintained that the Constitution prohibited the Legislature’s broad delegation of powers in the statute.

The City framed the issue as a constitutional question in an effort to reach common ground. Ironically, this was intended to be an implicit concession that the Constitution, rather than RCW 35A.11.020, defines the scope of the City’s exemption authority. In light of the positions they had taken below, the City believed that DOR and the County would welcome this concession. The City thus represented in its Petition that the parties were in agreement that the question is quintessentially constitutional:

The parties agree that the answer to this question hinges on whether the Constitution prohibits legislative bodies other than the state Legislature from granting property tax exemptions. Stated differently, the question is whether the Constitution allows the Legislature to confer its exemption authority (in this case, the authority arising under Article VII, Section 10), upon first-class charter cities for implementation at the local level.

Petition at 10-11 (emphasis added).

For reasons unknown, DOR ignored the City’s attempt to frame the issue in a mutually agreeable manner. Instead, DOR misrepresented that the City was still relying on the *statute*, rather than the Constitution, as the source of its local exemption authority:

The crux of the City's argument concerns RCW 35A.11.020, where the Legislature granted "all powers of taxation" to code cities. The City reads the statute as granting it the same authority to grant exemptions as Section 10 grants exclusively to the Legislature.

DOR Answer at 1 (emphasis added).

Notably, DOR then proceeded to argue that the statute stands as an *independent* barrier to first-class charter cities exercising local exemption authority because, independently of what the Constitution may or may not allow, the Legislature did not intend to convey such authority:

[I]nterpreting RCW 35A.11.020 as the City does is unreasonable and contrary to express legislative intent. The Legislature did not use empty words when it said "within constitutional limitations," and the Court of Appeals properly ascribed meaning to that phrase.

DOR Answer at 15 (emphasis added); *see also* DOR Answer at 2 (arguing that the City's ordinance "violates both the statute and the Constitution.>").

In short, the City was content to treat RCW 35A.11.020 as a "pass through" of whatever exemption authority the Constitution affords to first-class charter cities. But DOR, in a departure from its prior briefing of the issue, argued that Legislature intended to convey *something less* than what the Constitution affords. Having raised this brand-new issue—and having misrepresented the City's position in the process—DOR can hardly object to the City offering its own, competing interpretation of the statute. DOR

opened the door, and the City is entitled to reply. *Blaney*, 151 Wn.2d at 210 n.3; *Chevron*, 156 Wn.2d at 139 n.6.

**C. DOR raised the new issue of whether the Court should consider purported impediments to DOR's administration of the property tax system in deciding whether to accept review.**

DOR's Answer asserted a number of arguments about the impact of a decision in the City's favor on its ability to administer the property tax system. Specifically, DOR argued—without citing any evidence in the record—that allowing the City's Ordinance to stand would “negatively impact Washington's property tax system” (DOR Answer at 2-3); would cause an “imbalance in tax revenue” for counties and other taxing districts (DOR Answer at 3); would allow the City to “balkanize the classification of property” (DOR Answer at 19); and would generally “complicate and impinge on the policy of uniformity in the administration of property taxes” (DOR Answer at 19).

DOR suggests that these are merely “countervailing public interest concern[s]” that support a denial of review. DOR Motion at 4. The Court should not be fooled. This is a legal issue that implicates DOR's ability (or perhaps more accurately, its willingness) to perform its statutory duties under Title 84 RCW. Framing the issue as a “public interest concern” in an effort to sidestep a reply by the City is disingenuous. Here again, DOR


raised a new issue that opens the door to a reply. *Blaney*, 151 Wn.2d at 210 n.3; *Chevron*, 156 Wn.2d at 139 n.6. The Court should deny DOR's motion to strike the City's Reply.

## II. CONCLUSION

For the reasons addressed above, the City respectfully requests that the Court deny DOR's motion to strike the City's consolidated reply brief.

RESPECTFULLY SUBMITTED this 5<sup>th</sup> day of January, 2017.

WITHERSPOON BRAJICICH McPHEE, PLLC

By 

Laura D. McAloon, WSBA #31164

James A. McPhee, WSBA #26323

John T. Drake, WSBA #44314

Attorneys for Petitioner City of Spokane



**CERTIFICATE OF SERVICE**

I, Veronica J. Clayton, hereby certify that a true and correct copy of the foregoing was served by the method indicated below to the following this 5<sup>th</sup> day of January, 2017.

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| <input type="checkbox"/> TELECOPY (FAX) TO:                                | Spokane County              |
| <input checked="" type="checkbox"/> EMAIL TO:                              | West 1115 Broadway Ave.     |
| <a href="mailto:jemacio@spokanecounty.org">jemacio@spokanecounty.org</a>   | Spokane, WA 99260           |
| <a href="mailto:RArkills@spokanecounty.org">RArkills@spokanecounty.org</a> |                             |
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| <a href="mailto:KMiller@ettermcmahon.com">KMiller@ettermcmahon.com</a>     |                             |
| <input checked="" type="checkbox"/> U.S. MAIL                              | Elizabeth L. Schoedel       |
| <input type="checkbox"/> HAND DELIVERED                                    | Office of the City Attorney |
| <input type="checkbox"/> OVERNIGHT MAIL                                    | 808 W. Spokane Falls Blvd.  |
| <input type="checkbox"/> TELECOPY (FAX) TO:                                | Spokane, WA 99201-3333      |
| <input checked="" type="checkbox"/> EMAIL TO:                              |                             |
| <a href="mailto:ESchoedel@spokanecity.org">ESchoedel@spokanecity.org</a>   |                             |
| <input checked="" type="checkbox"/> U.S. MAIL                              | Robert Ferguson             |
| <input type="checkbox"/> HAND DELIVERED                                    | Andrew Krawczyk             |
| <input type="checkbox"/> OVERNIGHT MAIL                                    | Office of the Attorney      |
| <input type="checkbox"/> TELECOPY (FAX) TO:                                | General/RevDiv              |
| <input checked="" type="checkbox"/> EMAIL TO:                              | Post Office Box 40123       |
| <a href="mailto:juliej@atg.wa.gov">juliej@atg.wa.gov</a>                   | Olympia, WA 98504-0123      |
| <a href="mailto:andrewk1@atg.wa.gov">andrewk1@atg.wa.gov</a>               |                             |
| <a href="mailto:REVOlyEF@atg.wa.gov">REVOlyEF@atg.wa.gov</a>               |                             |

  
Veronica J. Clayton

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VICKI HORTON, Spokane County Assessor, ROB CHASE, Spokane  
County Treasurer,

and

THE STATE OF WASHINGTON, by and through the Department of  
Revenue,

Respondents.

---

DECLARATION OF JOHN T. DRAKE IN SUPPORT OF  
PETITIONER'S RESPONSE TO DEPARTMENT OF REVENUE'S  
MOTION TO STRIKE PETITIONER'S CONSOLIDATED REPLY

---

Attorneys for Petitioner  
Laura D. McAloon, WSBA #31164  
James A. McPhee, WSBA #26323  
John T. Drake, WSBA #44314  
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601 West Main Avenue, Suite 714  
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 ORIGINAL

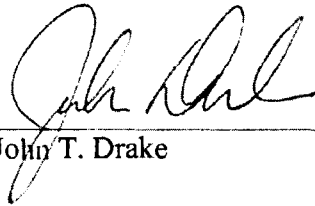
I, John T. Drake, declare as follows:

1. I am over the age of 18 and competent to testify herein.
2. I am one of the attorneys for Petitioner City of Spokane (“City”) in the above-captioned proceeding.
3. Respondent Department of Revenue (“DOR”) served the City with its Motion to Strike Petitioner’s Consolidated Reply (“Motion”) on December 14, 2016.
4. I reviewed the Motion and observed that DOR had not cited any case law in support of its position. I also noted that the Motion made no effort to address the cases cited in the City’s Reply in support of the City’s authority to file a reply under RAP 13.4(d).
5. Believing that DOR had failed to research the applicable case law, I contacted counsel for DOR, Andrew Krawczyk, and asked him to review the cases cited in the City’s Reply. Mr. Krawczyk responded that DOR had reviewed the cases and stood by its position that no reply was authorized.
6. I then requested an opportunity to “meet and confer” with a view toward discussing whether the Motion comported with counsel’s ethical obligation to disclose adverse authorities and whether proceeding with the Motion was an appropriate use of taxpayer and judicial resources.

Mr. Krawczyk responded as follows: "I will give you five minutes at 1:30 pm today to call and try to convince me." A copy of my email correspondence with Mr. Krawczyk is attached hereto as **Exhibit A**.

I declare under penalty of perjury that the foregoing is true and correct to the best of my knowledge and belief.

DATED this 5<sup>th</sup> day of January, 2017, at Spokane, Washington.

A handwritten signature in cursive script, appearing to read "John T. Drake", is written over a horizontal line.

John T. Drake

**EXHIBIT A**

## John Drake

---

**From:** Krawczyk, Andrew (ATG) [AndrewK1@ATG.WA.GOV]  
**Sent:** Wednesday, December 14, 2016 12:46 PM  
**To:** John Drake  
**Cc:** ESchoedel@spokanecity.org; jemacio@spokanecounty.org; Laura McAloon; mfc@ettermcmahon.com; scpaappeals@spokanecounty.org; rarkills@spokanecounty.org  
**Subject:** RE: Electronic Filing - Document Upload

John,

There is no meet and confer requirement. But I will give you five minutes at 1:30 pm today to call and try to convince me. My number is below.

Andrew Krawczyk  
Assistant Attorney General  
Revenue and Finance Division  
PO Box 40123  
Olympia, WA 98504-0123  
(360) 586-3506  
fax: (360) 664-2023

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**From:** John Drake [mailto:JDrake@workwith.com]  
**Sent:** Wednesday, December 14, 2016 12:13 PM  
**To:** Krawczyk, Andrew (ATG)  
**Cc:** ESchoedel@spokanecity.org; jemacio@spokanecounty.org; Laura McAloon; mfc@ettermcmahon.com; scpaappeals@spokanecounty.org; rarkills@spokanecounty.org  
**Subject:** RE: Electronic Filing - Document Upload

Andrew,

I respectfully disagree. I believe it is appropriate to meet and confer. Please advise if you are not willing to do so.

John

---

**From:** Krawczyk, Andrew (ATG) [mailto:AndrewK1@ATG.WA.GOV]  
**Sent:** Wednesday, December 14, 2016 11:57 AM  
**To:** John Drake  
**Cc:** ESchoedel@spokanecity.org; jemacio@spokanecounty.org; Laura McAloon; mfc@ettermcmahon.com; scpaappeals@spokanecounty.org; rarkills@spokanecounty.org  
**Subject:** RE: Electronic Filing - Document Upload

John,

We have reviewed the authorities you indicated. We have a disagreement about whether your reply brief is proper. You have an opportunity to respond to our motion to strike and explain to the Court why you believe your reply brief is appropriate. A reasonable disagreement is not a basis for sanctions, and we should just let the Court decide the question about your brief and leave it at that. I don't think it is necessary to confer about this.

Andrew Krawczyk  
Assistant Attorney General  
Revenue and Finance Division  
PO Box 40123  
Olympia, WA 98504-0123  
(360) 586-3506  
fax: (360) 664-2023

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**From:** John Drake [mailto:JDrake@workwith.com]  
**Sent:** Wednesday, December 14, 2016 11:18 AM  
**To:** Krawczyk, Andrew (ATG)  
**Cc:** Johnson, Julie (ATG); [ESchoedel@spokanecity.org](mailto:ESchoedel@spokanecity.org); [jemacio@spokanecounty.org](mailto:jemacio@spokanecounty.org); Laura McAloon; [mfc@ettermcmahon.com](mailto:mfc@ettermcmahon.com); ATG MI REV Oly EF; [scpaappeals@spokanecounty.org](mailto:scpaappeals@spokanecounty.org); [rarkills@spokanecounty.org](mailto:rarkills@spokanecounty.org)  
**Subject:** RE: Electronic Filing - Document Upload

Andrew:

Please review the authorities cited on page 3 of the City's Consolidated Reply and withdraw your motion to strike. Alternatively, please let me know when you are available to meet and confer in connection with a potential motion for sanctions. I am available this afternoon from 1:00-4:00 and tomorrow from 8:00-11:00.

John

John T. Drake

Workland & Witherspoon  
 Attorneys at Law

A Professional Limited Liability Company  
601 W. Main Avenue, Suite 714  
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**Sent:** Wednesday, December 14, 2016 9:05 AM

**To:** [AndrewK1@ATG.WA.GOV](mailto:AndrewK1@ATG.WA.GOV); [ESchoedel@spokanecity.org](mailto:ESchoedel@spokanecity.org); John Drake; [jemacio@spokanecounty.org](mailto:jemacio@spokanecounty.org); [juliej@atg.wa.gov](mailto:juliej@atg.wa.gov); Laura McAloon; [mfc@ettermcmahon.com](mailto:mfc@ettermcmahon.com); [revolyef@atg.wa.gov](mailto:revolyef@atg.wa.gov); [scpaappeals@spokanecounty.org](mailto:scpaappeals@spokanecounty.org); [rarkills@spokanecounty.org](mailto:rarkills@spokanecounty.org)

**Subject:** Electronic Filing - Document Upload

**Court:** Supreme Court

**Case Number:** 93788-5

**From:** Julie Johnson

**Organization:** Attorney General's Office - Revenue & Finance Division

**Filed on Behalf of:** Andrew J Krawczyk

This is to inform you that the file(s) listed below were electronically filed for the above mentioned case by Julie Johnson from Attorney General's Office - Revenue & Finance Division, filed on behalf of Andrew J Krawczyk.

**Below is a link to each of the document(s) which have been filed with the court.**

- [937885\\_20161214085802SC620064\\_5393\\_Motion.pdf](#)

Attached is a copy of the Transmittal Letter sent to the court.

This court will treat this email as proof of service on you.

If you have any questions, please contact [virginia.neal@courts.wa.gov](mailto:virginia.neal@courts.wa.gov) and reference Filing Id 20161214085802SC620064.



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I, Veronica J. Clayton, hereby certify that a true and correct copy of the foregoing was served by the method indicated below to the following this 5<sup>th</sup> day of January, 2017.

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| <input checked="" type="checkbox"/> EMAIL TO:                              | West 1115 Broadway Ave.     |
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| <a href="mailto:RARkills@spokanecounty.org">RARkills@spokanecounty.org</a> |                             |
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| <input type="checkbox"/> OVERNIGHT MAIL                                    | Van Wert & Oreskovich, P.C. |
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| <a href="mailto:KMiller@ettermcmahon.com">KMiller@ettermcmahon.com</a>     |                             |
| <input checked="" type="checkbox"/> U.S. MAIL                              | Elizabeth L. Schoedel       |
| <input type="checkbox"/> HAND DELIVERED                                    | Office of the City Attorney |
| <input type="checkbox"/> OVERNIGHT MAIL                                    | 808 W. Spokane Falls Blvd.  |
| <input type="checkbox"/> TELECOPY (FAX) TO:                                | Spokane, WA 99201-3333      |
| <input checked="" type="checkbox"/> EMAIL TO:                              |                             |
| <a href="mailto:ESchoedel@spokanecity.org">ESchoedel@spokanecity.org</a>   |                             |
| <input checked="" type="checkbox"/> U.S. MAIL                              | Robert Ferguson             |
| <input type="checkbox"/> HAND DELIVERED                                    | Andrew Krawczyk             |
| <input type="checkbox"/> OVERNIGHT MAIL                                    | Office of the Attorney      |
| <input type="checkbox"/> TELECOPY (FAX) TO:                                | General/RevDiv              |
| <input checked="" type="checkbox"/> EMAIL TO:                              | Post Office Box 40123       |
| <a href="mailto:juliej@atg.wa.gov">juliej@atg.wa.gov</a>                   | Olympia, WA 98504-0123      |
| <a href="mailto:andrewk1@atg.wa.gov">andrewk1@atg.wa.gov</a>               |                             |
| <a href="mailto:REVOLyEF@atg.wa.gov">REVOLyEF@atg.wa.gov</a>               |                             |

  
Veronica J. Clayton

## OFFICE RECEPTIONIST, CLERK

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**To:** John Drake  
**Subject:** RE: Email Filing: Case No. 93788-5 (City of Spokane v. Horton, et al.) -- Petitioner's Response to DOR's Motion to Strike Reply

Received 1-5-17

Supreme Court Clerk's Office

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**From:** John Drake [mailto:JDrake@workwith.com]

**Sent:** Thursday, January 05, 2017 1:40 PM

**To:** OFFICE RECEPTIONIST, CLERK <SUPREME@COURTS.WA.GOV>

**Cc:** Laura McAloon <LMcAloon@workwith.com>; Roni Clayton <RClayton@workwith.com>; Schoedel, Elizabeth <eschoedel@spokanecity.org>

**Subject:** Email Filing: Case No. 93788-5 (City of Spokane v. Horton, et al.) -- Petitioner's Response to DOR's Motion to Strike Reply

Hello,

Please accept for email filing the following attached documents submitted by Petitioner City of Spokane:

1. *Petitioner's Response to Department of Revenue's Motion to Strike Petitioner's Consolidated Reply*
2. *Declaration of John T. Drake*

Case Name: City of Spokane v. Vicki Horton, Rob Chase, and Washington Department of Revenue

Case No.: 93788-5

Filed by: John T. Drake, WSBA #44314  
Counsel for Petitioner City of Spokane  
(509) 252-5666 (direct)  
[jdrake@workwith.com](mailto:jdrake@workwith.com)

Thanks,  
John

John T. Drake

Witherspoon Brajcich McPhee, PLLC

601 W. Main Avenue, Suite 714  
Spokane, Washington 99201  
Direct Line: (509) 252-5666  
Office: (509) 455-9077



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