No. 336221 and 336239

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION III

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CITY OF SPOKANE, a municipal corporation,

*Respondents*,

v.

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

*Appellants*,

and

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

*Interested Party*.

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# REPLY BRIEF OF APPELLANTS

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## I. Facts

Respondents, the City of Spokane ("the City") adopted a local exemption from a voter-approved levy lid lift (the "Ordinance") asserting that such an action was authorized under RCW 35A.11.020. CP 111-123. Both Appellants ("the County") and the Washington State Department of Revenue ("DOR") contend such action exceeded the City's constitutional and statutory authority.

The City characterizes the Ordinance creating this exemption as imposing an immediate exemption, applicable to "all citizens who qualify for and are authorized to receive the state of Washington's property-tax exemption." *See Respondent City of Spokane's Response to Appellants' Opening Brief*, page 1 (hereinafter "Response"). The County and DOR contend, as is discussed in detail *infra*, that the Ordinance's language does not support this characterization.

The City attempts to describe the County's actions as "repeated" refusals to implement the Ordinance and perform their ministerial obligations. *See generally Response*. This ignores the DOR's directive not to implement the Ordinance. CP 124-125. This directive, under RCW 84.08.080, was recognized by the lower court in the following conclusions of law:

> 14. For purposes of this order and the accompanying Writ of mandamus only, DOR's letter of February 17, 2015 is a directive issued to Defendants pursuant to RCW 84.08.080.
>
> 15. For purposes of the Order and the accompanying Writ of Mandamus only, the County was required to follow DNR's directive that the Ordinance "not be implemented" conclusion of law not challenged by the City. Several "facts" and citations to the Court's record are misstated by Respondent, City of Spokane (hereinafter "City").

CP 384. The lower court's decision to issue the Writ of Mandamus is based upon its legal determination that: (1) the City did, in fact, have the lawful authority to create such an exemption; and (2) the DOR did not have the authority to issue such a directive. *Id.*; *see also* CP 319-322. As argued below, the County contends both conclusions are in error.

Mandamus is alternatively defeated in that the City had a "plain, speedy, and adequate remedy" in the ordinary course of law and was not a "beneficially interested" party.

Finally, the Writ of Mandamus issued is not appropriate, in that the acts it compels – i.e. – the immediate and retroactive implementation of the exemption for individuals who had previously applied for and received an exemption by the State – is not called for by the language of the Ordinance itself.

The City, in its Statement of the Case, continues to attempt to place blame on the County for the City's own legal interpretation of the levy passed by the voters and its impact on those qualified for an exemption under state law. *Response*, pages 4-6. The City's reliance on a conclusory statement by a City official was not convincing or material to the issues before the Court. *See* CP 27.

The Order Granting the Writ, after reviewing the pleadings in their entirely only concludes:

> The City believed the citizens subject to the levy would have the benefit of the state property tax exemption for limited-income senior citizens and disabled veterans set forth in RCW 84.36.381 ("state exemption"), and represented this belief to the public.

CP 381. The City's attempt to imply that the County acted in a manner that intentionally misled the City or cavalierly ignored its duty under the law is simply unsupported by the record.

## II. Standard of Review

The City erroneously applies the standard of review applicable to the County's first assignment of error, asserting that the error should be reviewed "for an abuse of discretion because the County challenged the trial court's decisions as to whether the County was excused from its ministerial duties because the DOR said the Ordinance was unconstitutional ..." *Response*, page 8.

In fact, in the first assignment of error the County challenges the courts legal conclusion that it had a clear duty to act in the manner urged by the City. The assignment of error stated as follows:

> 1. The Court erred in ordering and issuing a Writ of Mandamus pursuant to RCW 7.16.060 because Appellants had no clear duty to implement the Ordinance, the Ordinance being in conflict with the express directive given by the Washington State Department of Revenue, specific provisions of State law, and the Washington State Constitution

*Brief of Appellants*, page 1. This issue turns on a question of law – i.e. whether the County was bound by the express direction of the DOR and prohibited from acting in a manner alleged by the state to be contrary to law. Because the court is asked to review a question of law it must be reviewed de novo. *City of Gig Harbor v. North Pacific Design, Inc.*, 149 Wn. App. 159, 167, 201 P.3d 1096 (2009). Whether a statute specifies a duty such that mandamus may issue is reviewed de novo. *Cost Mgmt. Servs., Inc. v. City of Lakewood*, 178 Wn.2d 635, 648-49, 310 P.3d 804 (2013). "The determination of whether a statute specifies a duty that the person must perform is a question of law. *River Park Square L.L.C. v. Miggins*, 143 Wn.2d 68, 76, 17 P.3d 1178 (2001). Assignment of error number four is reviewed under the same standard because it rests upon an interpretation of the express language of the Ordinance in question, and is also a question of law. *City of Gig Harbor*, 149 Wn. App. at 167.

### III. Appellants had no clear duty to act

Despite the lower court's conclusion of law to the contrary, the City continues to contend the DOR's February 17, 2015 letter was an "opinion" that the County was free to ignore. *Response*, page 10. The court's conclusion as set forth above, i.e. that the letter issued by the DOR is a directive issued pursuant to RCW 84.08.080, is supported by the language of the statute and directive itself. RCW 84.08.080 states as follows:

> The department of revenue shall, with the advice of the attorney general, decide all questions that may arise in reference to the true construction or interpretation of this title, or any part thereof, with reference to the powers and duties of taxing district officers, and such decisions shall have force and effect until modified or annulled by the judgment or decree of a court of competent jurisdiction.

The directive contains almost identical language:

> Chapter 84.08 RCW sets forth the responsibilities of the Department of Revenue (Department) with respect to the property tax system. The Department is required to decide questions of interpretation of the provisions of Title 84, with the advice of the attorney general. ... Because the City's ordinance creates an exemption that is not authorized under state law, it should not be implemented.

CP 124-125. The City argues that the County's position is unfounded, based apparently upon the self-serving statements of one of City's counsel as to what the DOR "actually" meant. CP 277. This assertion is based

solely upon a hearsay declaration[1] reflecting a telephone conversation in which the County did not participate. *See id.*

The only other communication the County received from the DOR was contained in an e-mail sent to the County and County Prosecutor. CP 145-150. The e-mail simply concluded: "My letter of February 17th provides the Department's opinion regarding the City's ordinance. Our opinion has not changed." CP 145-150.

The County properly considered the correspondence of February 17, 2015 a directive issued pursuant to RCW 84.08.080. The County was faced with two clearly conflicting statutory directives. On one hand, the County has a statutory duty to confer with the DOR "as to their duties under the law and the statutes of the state, relating to taxation" which is what occurred here, and give such direction the "full force and effect" required by the statute. RCW 84.08.080.

On the other hand, the County Treasurer is the "ex officio collector of city taxes" for the City of Spokane, and the County Assessor is the "ex officio assessor" for the City of Spokane. RCW 35A.84.020, .030. In addition, both the City and County are required to comply with provision of Chapter 84.40 RCW and Chapter 84.56 RCW in creating tax rolls and

[1] The use and consideration of this declaration was objected to by counsel for the County. *See* Verbatim Report of Proceedings dated April 2, 2015, page 32, lines 2-5, "[t]he hearsay declaration by counsel ... clearly that is inadmissible.")

collecting taxes, as well as Chapter 84.36 RCW concerning exemptions. RCW 35A.84.010. These duties came in direct conflict with one another after the City adopted the Ordinance and the DOR directed the County not to implement it. There was no clear ministerial duty for the County to perform.

This circumstance is clearly distinguishable from the also somewhat unique circumstances found in *State v. Turner*, 113 Wn. 214, 193 P. 715 (1920). The Treasurer in *Turner* refused tender of a partial tax payment. *Id.* Even though the tax levy was apparently in error, the court found that the County Treasurer has no clear legal duty or authority to correct that mistake. *See id.* The circumstance here is dissimilar. Here, the lack of a clear duty rests upon the contrary duties set forth by the statutes discussed above. Further, in *Turner*, a tax roll was at issue (the authority for which is clearly delineated); here a tax exemption is at issue, the authority for which is clearly questioned. *See generally id.*

The City also relies upon *State ex. rel. Mason Cty. Logging Co. v. Wiley*, 177 Wash. 65, 75, 31 P. 2d 539, 544 (1934), which, again, is dissimilar to the facts at hand. *Wiley* holds only that mandamus may be available to compel a party to "perform a certain ministerial act, in compliance with an express statutory mandate." *Id.* at 75. The bulk of *Wiley* concerns the validity of certain legislation. *See generally id.* Here,

the County did not exercise any judicial function or determine the City's exemption was illegal. It was simply placed in a position where an interpretation of law was necessary for it to act without being in violation of statutory mandates.

The lawfulness of the Ordinance in question – or the lack thereof – asserted by the DOR in its directive, further compromised the ability of a court to conclude – as is required by mandamus – that the duty to act on the part of the County was clear; and, also operates to block mandamus, in that, if the act being compelled is unlawful, mandamus will not lie. *See State v. Turner,* 113 Wn. 214, 214, 193 P. 715 (1920) (citing *Hindman v. Boyd*, 42 Wash. 17, 87 P. 609 (1906)).

The City bases its ability to enact the Ordinance in question by first asserting that the powers of taxation under RCW 35A.11.020 provides it with authority to implement tax exemptions that are in direct conflict with the State's taxation scheme. This conclusion is not supported by the Washington Constitution, applicable state statutes, accepted treatises, or relevant decisions both in Washington and in other jurisdictions.

To the contrary, courts have concluded that the power to tax and the power to exempt are separate and distinct powers. *See* 16 McQuillin Mun. Corp. § 44:82 (3d. ed.) ("the delegation of power to tax does not include power to exempt from taxation"); *see also State v. Wooster*, 163

Wn. 659, 2 P.2d 653 (1931) (holding as distinct the Legislature's power to exempt property from taxation).

Other jurisdictions have likewise found these powers to be separate and distinct. *City of Jackson v. Pittman*, 484 So.2d 998 (Miss. 1986) ("[D]elegation of power to tax does not include power to exempt from taxation."); *see also St. Lucie Estates v. Ashley*, 105 Fla. 534, 141 So. 738 (1932) ("The power to tax does not include the power to exempt..."); *County of Sullivan v. Town of Tusten*, 899 N.Y.S.2d 455, 72 A.D.3d 1470 (N.Y. 2010) ("a municipality may not act in excess of the powers conferred upon it.").

Because a city has no inherent power to tax, any authority must be granted by the legislature. *Pac. First Fed. Sav. & Loan Ass'n v. Pierce County*, 27 Wn.2d 347, 178 P.2d 351 (1947). In the same fashion, because exemptions create non-uniform tax burdens, the authority for cities to create exemptions should be clearly stated by the legislature. *See Belas v. Kiga*, 135 Wn.2d 913, 933, 959 P.2d 1037 (1998). The City has not provided any such statutory authority.

In fact, RCW 35A.84.010's mandate that cities must adhere to the property tax exemptions as adopted in Chapter 84.36 RCW directly refutes the City's argument that the powers of taxation referenced in RCW

35A.11.020 include authority for the City to create its own unique property tax exemption. *See* RCW 35A.84.010.

The proposed exemption fails to meet the uniformity requirements repeatedly asserted by the Constitution and relevant case law. The only circumstance in which this uniformity requirement is waived is for tax exemptions for retired property owners – an exemption that can only to be granted by the Legislature. *See* Wash. Const. art. VII § 10; *see also Belas*, 135 Wn.2d at 933 (1998), Wash. Const. art. VII, § 9.

The distinction relied upon by the City between the use of the words "access and collect" found in the specific statutes setting forth the specific authority of cities and municipal organizations depending upon the adopted form of government, and "all powers of taxation" as set forth in RCW 35A.11.020 is a dissimilarity without any pertinent distinction. Simply because the taxation powers of municipal organizations are referred to in different terms does not support the City's conclusion that the power to exempt is somehow included within the term found RCW 35A.11.020. The relied upon language of RCW 35A.11.020 must be read in context of the entire provision. Powers vested by this provision were created to ensure code cities would have all powers of cities that had been established by the Constitution and the general law, including the power to tax. *See also* RCW 35A.11.030. While RCW 35A.11.020 is clearly

intended to identify the broad powers vested in code cities under the general law and the constitution, it certainly is not intended to create an additional right not expressly set forth elsewhere.[2]

It should also be noted that RCW 35A.11.020, provides that any power the City exercises must be "within constitutional limitations" discussed *supra. Id.*; *See also State v. Wooster*, 163 Wn. 659, 2 P.2d 653 (1931), (and further governed by RCW 35A.84.010 which expressly incorporates Chapter 84.36 RCW concerning exemptions). Because of the tendency of tax exemptions to create non-uniformity of taxation, the authority to create tax exemptions should only be found where the legislature utilizes only clear and explicit language. *Belas v. Kiga*, 135 Wn.2d 913, 933, 959 P.2d 1037 (1998). The general language "all powers of taxation" in RCW 35A.11.020 is not a clear, express grant of authority to create tax exemptions.

One example of an express grant of authority is RCW 35.21.768 which "provides the explicit statutory authority permitting [the City of]

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[2] The City cites *Betts v. Zeller*, 263 A.2d 290 (Del. 1970) in support of its contention that the power to tax includes the power to exempt. However, in Delaware, a specific grant of authority was given to individual *counties* through an amendment to the Delaware Constitution. *See* Del.C.Ann. Const., Art. 8, § 1. A subsequent case discussing this amendment concluded "the legislature intended merely a modification of tax exemption procedure, not a radical change in the substantive area of tax exemption. *State ex rel. Secretary of Dep't of Highways and Transp. V. New Castle County*, 340 A.2d 171, 174 (Del. 1975). No such specific grant of authority exists in this case, and further, the courts of Delaware have limited the scope of the exemption authority granted by the amendment to the Delaware constitution. This case and its conclusions are thus, not on point in the case at hand.

Kennewick to impose an ambulance charge on households, businesses, and industries in Kennewick." *Arborwood Idaho, L.L.C. v. City of Kennewick*, 151 Wn.2d 359, 366, 89 P.3d 217 (2004). RCW 35.21.768 states in relevant party "the legislative authority of any city or town is authorized to adopt ordinances ... for the imposition of an additional tax for the act or privilege of engaging in the ambulance business. ... The excise tax ... authorized by this section shall be levied and collected from all persons, businesses, and industries who are served and billed for said ambulance service..").[3] No similar grant of express authority exists in this case.

The City argues *City of Wenatchee v. Chelan Cty. Pub. Util. Dist. No.1*, 181 Wn. App. 326, 325 P.3d 419 (2014) is not distinguishable, but it clearly is dissimilar to the case at hand. *City of Wenatchee* recognizes that a city has broad authority to impose excise taxes on other municipalities for regulation of revenue. The City's power to tax is not at issue in this case, but the City's lack of power to exempt. Both the factual background and the legal conclusions of *City of Wentachee* are inapposite to the case at hand.

## IV. Mandamus was not the City's sole remedy

The City contends it was

[3] In *Arborwood Idaho, L.L.C. v. City of Kennewick,* the court found that the ordinance enacted exceed this express authorization.

> "force[d] ... to bring a petition for writ of mandamus seeking to compel [the County] to perform their duties."

*Response*, page 2 (emphasis added). This is contrary to what is clearly demonstrated in the record. The City had a number of options. It could either have challenged the State's directive or sought declaratory relief.

The City offers this court no real guidance into *why* a declaratory judgment would not have been an adequate remedy, but simply asserts its Ordinance is presumed constitutional and, thus, seeking a declaratory judgment in lieu of a writ of mandamus would be an "extraordinary" requirement. *Response*, page 33. It is well-settled that the issuance of writ of mandamus is an extraordinary legal remedy. *Eugster v. City of Spokane*, 118 Wn. App. 383, 402, 76 P.3d 741 (2003).

The Court has found "that the Uniform Declaratory Judgments Act provides a procedure 'peculiarly well suited to the judicial determination of controversies concerning constitutional rights ... and the constitutionality of legislative action.'" *See Seattle School Dist. No. 1 of King County v. State*, 90 Wn.2d 476, 490, 585 P.2d 71 (1978) (wherein the Court interpreted for various governmental entities the meaning and application of Wash. Const. art. IX, §§ 1 and 2). In *Seattle School Dist.*, the Court further stated "where the question is one of great public interest and has been brought to the court's attention with adequate argument and briefing, and where it appears that an opinion of the court will be

beneficial to the public and to other branches of government, the court may ... render a declaratory judgment to resolve a question of constitutional interpretation." *Id.*

The City attempts to bypass and gloss over the requirement of mandamus that "no plain, speedy and adequate remedy in the ordinary course of law" exist. RCW 7.16.170. Clearly, the City had an alternative remedy in seeking a declaratory judgment to determine the constitutionality of its Ordinance but decided to seek mandamus instead. It is also important to note that the City, in its initial Complaint for Emergency Temporary Restraining Order, Preliminary Injunction, and Declaratory Judgment did exactly that. CP 1-6. It requested that the court issue "[a] judgment declaring that the tax exemption granted to senior citizens in Ordinance No. C-35231 is valid." *Id.* The City, for whatever reason, chose to amend its complaint and drop its request for declaratory relief.

The City also contends that because it was not a party to the correspondence between DOR and the County, it could not have exercised any appeal of the DOR's directive. In fact, when the County received the directive from DOR, it immediately provided the same to the City. CP 145-150. Apparently, the City was in immediate contact with the DOR

concerning the same. CP 277. The City was hardly a "stranger to these proceedings." *Response*, page 34.

An appeal of the DOR decision would be filed pursuant to the Administrative Procedure Act ("APA"). RCW 34.05.530 states:

> A person has standing to obtain judicial review of agency action if that person is aggrieved or adversely affected by the agency action. A person is aggrieved or adversely affected within the meaning of this section only when all three of the following conditions are present:
>
> > (1) The agency action has prejudiced or is likely to prejudice that person;
> >
> > (2) That person's asserted interests are among those that the agency was required to consider when it engaged in the agency action challenged; and
> >
> > (3) A judgment in favor of that person would substantially eliminate or redress the prejudice to that person caused or likely to be caused by the agency action.

The City meets these requirements and could have challenged the DOR's directive in this forum. The directive clearly constitutes "agency action." *See* RCW 34.05.010(3); *see also Wells Fargo Bank N.A. v. Dep't of Revenue*, 166 Wn. App. 342, 360-61, 271 P.3d 268 (2006). Courts have refused to find when such an adverse action is subject to a statutory appeal process such as the APA that an adequate remedy does not exist. *See State v. Abrahamson*, 98 Wn. 370, 376, 168 P. 3 (1917); *see also Torrence v. King Co.*, 136 Wn. 2d 783, 793, 966 P. 2d 891 (1998). The City chose

not to explore this option, and offers this court a conclusory discussion without any interpretation of the requirements under the APA.

## V. The City is not a beneficially interested party

The third requirement of mandamus is that the City must be "beneficially interested," and thus have standing to initiate mandamus. *Eugster v. City of Spokane*, 118 Wn App. 383, 403, 76 P.3d 741 (2013). In support of its argument, the City cites *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 534 P.2d 114 (1975). In *City of Tacoma*, the petitioners seeking mandamus were a city, county, and an individual taxpayer together, who brought the action as taxpayers. *Id.* The case concerned a challenge to a state legislative enactment that would result in a substantial expenditure of public funds and was directed to the State treasurer. *Id.* The authority relied upon by the Court in *City of Tacoma* all concerned challenges to state officials, where the court found the only "condition precedent to such standing that the Attorney General first decline a request to institute the same." *Id.* at 269. While the court found in *City of Tacoma* no "justifiable reason to apply a different standard where a county or municipality brings the action" the facts are dissimilar to those at hand. *See id.*

The City also cites *City of Seattle v. State*, 103 Wn. 2d 663, 668, 694 P. 2d 641 (1985), which concerned a City's standing to challenge a

state statute as special legislation, or more specifically, "challenging the constitutionality of a legislative act." There is no legislative act being challenged in the case at hand. Here, the aggrieved party is the taxpayer who would incur a minor increase in taxes owed. As set forth in *Bunting v. State*, 87 Wn. App. 647, 651, 943 P. 2d 347 (1997) the doctrine of standing generally prohibits a party from asserting another person's rights. *See also Hoppe v. King County,* 95 Wn.2d 332, 622 P. 2d 845 (1980).

## VI. The Writ exceeds the language of the Ordinance

The application and scope of the Ordinance in question is determined by the language of that Ordinance. *See Hatley v. City of Union Gap*, 106 Wn. App. 302, 307, 24 P.3d 444 (2001). The only language relied upon by the City in support of its contention that implementation was to begin in 2015 and was to be automatic is a recitation of emergency language preceding the ordinance. CP 12.

The words contained within the ordinance state: "a claim for exemption...may be made and filed at any time during the year for exemptions from taxes payable the following year and thereafter..." CP 118 (emphasis added). While the City points to a recitation in the Ordinance that it was enacted for emergency purposes, the City's conclusion is contrary to the express language of the Ordinance. The Writ required the County to take specific steps to implement the Ordinance

immediately, an action which appears to be in direct conflict with the Ordinance's own language. CP 392.

The Writ further requires the County to determine the eligible taxpayers by reference to the roll of taxpayers and to issue and mail amended tax statements. CP 392. Again, this goes against the language of the Ordinance itself, which requires a taxpayer to affirmatively apply for the City's exemption. CP 118-119. The City now states the exemption "must be applied automatically." *Response*, page 38. This requirement is not expressly set forth in the ordinance in question. CP 118-119.

The City argues that the statutory remedy for an error in taxes, (i.e. a tax refund under Chapters 84.68 or 84.69 RCW) is apparently not applicable to this circumstance because there was no error. Inexplicitly, the City at the same time argues that in fact the actions by the County constituted error. The record and language of the ordinance itself clearly supports the County's contention that the Writ both exceeds the scope of the language of the Ordinance and orders performance that is inconsistent with state law. As such, it should not stand.

## VII. Conclusion

The County respectfully request this Court reverse the trial court's findings and issuance of a Writ of Mandamus.

RESPECTFULLY SUBMITTED this 18th day of March 2016.

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Rob Chase, Spokane County Treasurer
1115 West Broadway Ave.
Spokane, WA 99260
509-477-3672 p

## DECLARATION OF SERVICE

I, Kristie Miller, declare and say as follows:

1. I am a citizen of the United States and resident of the State of Washington, over the age of 18 years, not a party to the above-entitled action, and am competent to be a witness herein. My business address is 618 W. Riverside Ave., Ste. 210, Spokane, Washington 99201-5048, and telephone number is 509-747-9100.

2. On March 18, 2016, I caused to be served Appellants' Reply to City's Response to Motion for Stay on the individuals named below in the manner indicated.

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|---|---|
| Laura McAloon<br>James A. McPhee<br>Workland & Witherspoon, PLLC<br>601 W. Main Ave., Ste. 714<br>Spokane, WA 99201 | ☐ U.S. Mail, postage prepaid<br>☒ Hand delivery<br>☐ Facsimile<br>☐ E-Mail<br>lmcaloon@workwith.com<br>jmcphee@workwith.com |
| Mr. James Emacio<br>Chief Civil Deputy<br>Prosecuting Attorney<br>Mr. Ronald P. Arkills<br>Sr. Deputy Prosecuting Attorney<br>Spokane County Prosecutors Office<br>1115 West Broadway Ave.<br>Spokane, WA 99260 | ☐ U.S. Mail, postage prepaid<br>☒ Hand delivery<br>☐ Facsimile<br>☐ E-Mail<br>JEmacio@spokanecounty.org<br>RArkills@spokanecounty.org |

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|---|---|
| Mr. Robert W. Ferguson<br>Attorney General of Washington<br>Mr. Andrew Krawczyk<br>Assistant Attorney General<br>Revenue Division<br>PO Box 40123<br>Olympia, WA 98504-0123 | ☐ U.S. Mail, postage prepaid<br>☐ Hand delivery<br>☐ Facsimile<br>☒ E-Mail<br>AndrewK1@ATG.WA.GOV |
| Nancy Dykes Isserlis<br>City Attorney<br>Elizabeth Louis Schoedel<br>Assistant City Attorney<br>Office of the City Attorney<br>808 W Spokane Falls Blvd Fl 5<br>Spokane, WA 99201-3333 | ☐ U.S. Mail, postage prepaid<br>☒ Hand delivery<br>☐ Facsimile<br>☐ E-Mail<br>nisserlis@spokanecity.org |

I declare under the penalty of perjury under the laws of the state of Washington that the foregoing is true and correct.

Dated this 18th day of March, 2016, at Spokane, Washington.

Kristie Miller