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STATE OF WASHINGTON

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NO. 34798-9-II

IN THE COURT OF APPEALS

STATE OF WASHINGTON

DIVISION II

PAUL W. POST,
REX WILLIAMS and FRANCES WILLIAMS (husband and wife),
and GERALD PAULSON and CAROL PAULSON (husband and wife)

Appellants,

v.

CITY OF TACOMA

Respondent.

APPELLANTS' REPLY BRIEF

ORIGINAL

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I. INTRODUCTION

The parties have stated the facts in their prior briefs. The pertinent facts are:

1. City streets and right of ways create 27% of storm and surface water runoff being treated and disposed of by the utility created by the City (ESD).

2. The City is exempted from paying the cost of treating and disposing of storm and surface water runoff created by the City streets.

The trial court determined the entirety of the operation of the storm and surface water drainage facility was proprietary and the charges for said services were fees being paid by the users of said services.

II. ISSUES

A. PLAINTIFFS/APPELLANTS HAVE PROVED THROUGH ARGUMENT AND RESEARCH AND FACTS THEY PAY HIGHER FEES AS A RESULT OF THE EXEMPTION CREATED BY TMC 12.08.530.

The City claims throughout its brief Plaintiffs/Appellants have presented no facts to support their position property owners pay higher fees as a result of the exemption created by TMC 12.08.530. Yet the City claims there is no factual dispute. See City's Brief at Page 7. As argued below, when challenging the constitutionality of the ordinance, the challenger can rely upon argument and research. *Belas v. Kiga*, 135 Wn.2d 913, 959 P.2d

1037 (1998). The City's ordinance provides it is paying for street-created runoff by providing a benefit to the utility by donating streets. As a result, the City exempts itself from storm and surface water drainage. (CP 316; Defendant's/Respondent's Brief, Pages 1, 5, and 6). Who pays for the storm and surface water drainage created by the streets if it is not the property owners? Paul Post's research has shown the City itself claims 27% of the storm and surface water processed through its utility drainage system was created by the City streets. (CP 316) The City has not contested this fact.

The City itself claims the storm and surface water utility in its entirety is a proprietary function. The only conclusion that can be derived from said claim is the property owners are paying for the entirety of the cost of storm and surface water drainage, which includes the drainage from the City streets. The City cites *Okeson v. City of Seattle*, 150 Wn.2d 540, 78 P.3d 1279 (2003) in one instance as providing a governmental function (See Defendant's/Respondent's Brief, Page 18) when its electric utility provides electricity for street lights and a proprietary function when the electric utility is providing electricity to private property owners. See Defendant's/Respondent's Brief, Page 19. The City of Tacoma is doing indirectly what the court in *Okeson* did not allow the City of Seattle to do directly.

B. THE FINDINGS THE CITY ARGUES ARE CONCLUSIVE ARE IN VIOLATION OF THE SEPARATION OF POWERS CLAUSE OF THE WASHINGTON STATE CONSTITUTION.

The City states on Page 9 of its Brief that legislative findings are conclusive even in non-emergency situations. The Defendant cites the case of *The City of Tacoma v. O'Brien*, 85 Wn.2d 266 at 271, 534 P.2d 114, (1975) to support its position. The Supreme Court in that case actually determined the factual findings of the Legislature were not conclusive because the findings were precluded by the Constitutional Doctrine of Separation of Powers because the Legislature made a judicial determination. The Court said: "While a Court will not controvert legislative findings of fact, the Legislature is precluded by the Constitutional Doctrine of Separation of Powers for making judicial determinations." The Supreme Court cited the cases of *Washington State Highway Comm'n v. Pacific Northwest Bell Tel. Co.*, 59 Wn.2d 216, 369 P.2d 605 (1961) and the case of *Plummer v. Gaines*, 70 Wn.2d 53, 422 P.2d 17 (1966). The Court said in *Gaines* the Legislature could not determine what constituted a general election because that determination involved an interpretation under our system of government that could only be determined by the judicial branch. *The City of Tacoma v. O'Brien*, supra at 271, also cited courts from other jurisdictions that have made such determinations as: A legislature cannot determine the existence of

liability under insurance policies, *State Farm Mutual Auto Insurance Company v. Christensen*, 88 Nev. 160, 494 P.2d 552 (1972); cannot declare conclusively what constitutes adulterated food, *State v. A. J. Bayless Mkts, Inc.*, 86 Ariz. 193, 342 P.2d 1088 (1959); cannot interpret provisions of a will, *Hartford v. Larrabee Fund Ass'n*, 161 Conn. 312, 288 A.2d. 71 (1971); cannot determine whether a particular use of property is charitable, *People ex rel. Nordlund v. Association of Wennebago Home for the Aged*, 40 Ill.2d 91, 237 N.E.2d. 533 (1968); cannot determine what constitutes just compensation, *State Plant Bd. v. Smith*, 110 So.2d 401, FLA (1959). In *The City of Tacoma v. O'Brien*, supra, our Supreme Court stated the legislature could not determine a finding of economic impossibility as that is (similar to the above cases) adjudicatory.

Likewise in the case at hand, the City through its ordinance, made a determination directly and indirectly that the city streets provided an “in-kind service” that benefited private property owners in the same amount of the burden created by the city streets to the storm and surface water drainage. TMC 12.08.530. In essence, the Defendant/Respondent is defining what an “in-kind service” is. The interpretation of the State statute cites RCW 35.67.025 and RCW 35.92.021, which can only be determined by the judiciary. As a result, the City has engaged in a legislative attempt to make

an adjudication that violates the Separation of Powers Doctrine and is therefore void. *The City of Tacoma v. O'Brien*, supra at 272.

C. A UTILITY PROVIDING SERVICE TO A GOVERNMENT WHILE PROVIDING A SIMILAR SERVICE TO PRIVATE PROPERTY OWNERS IS ACTING IN A GOVERNMENTAL AS WELL AS PROPRIETARY CAPACITY.

The Defendant has cited several cases it claims supports its position that providing storm water and surface drainage together with sewer services by a city utility is in essence a business enterprise that makes the activity proprietary in nature. As a result the utility can charge fees for the service. As stated in Plaintiffs'/Appellants' original brief, Plaintiffs/Appellants do not deny providing storm and surface water drainage facilities to private property owners is an activity that is proprietary in nature. What the City refuses to acknowledge is the same activity can have a dual nature. The City cites the case of *Okeson v. Seattle*, supra, to support its position. The City cites *Okeson* as a utility providing services as proprietary. However, one may look only to the *Okeson* case to see that utilities do provide a dual service, both proprietary (see City's Brief, Page 19) and governmental (see City's Brief, Page 18). In *Okeson*, providing electrical services to private property owners was proprietary in nature and a fee could be charged. However, providing electricity to operate streetlights was done for a governmental purpose which

had to be paid through the general fund which is created by taxes. See *Okeson v. Seattle*, supra at 551. *Okeson* says, “Hence, while the electric utility itself is a proprietary function of government, the maintenance of streetlights is a governmental function.” Like *Okeson*, providing sewer, storm and surface water drainage utility services is a proprietary function of government when the service is provided to property owners while providing said utility for drainage of surface and storm water created by the city streets is a governmental function. The Court in *Okeson* determined the analysis was based on the function or benefit being provided. In this case the function or benefit being provided was the drainage being created by the city streets. This is much like the function of the streetlights providing light to the city streets. The purpose is for the public benefit in both cases.

The City cites a number of older cases to also support its position that providing sewer services is an activity that is proprietary in nature. As can be seen by reading the cases cited by the Defendant, most involve the determination as to whether or not the City is liable for a tort. See *Seattle v. Stirret*, 55 Wash. 560, 104 P. 834 (1909); *Russell v. City of Grandview*, 39 Wn.2d 551, 236 P.2d 1061 (1951); *Loger v. Washington Timber Products Inc.*, 8 Wn.App. 921, 509 P.2d 1009 (1973); and *Hayes v. Vancouver*, 61 Wash. 536, 539, 112 P. 498, (1911). All of the above cases were brought in

tort for damages created by the various cities' negligence. They dealt with the issues of determining liability for negligence rather than determining whether the activity was required to be paid for by fees or taxes. The analysis of said cases is different. The case of *Algona v. Pacific*, 35 Wn.App. 517, 667 P.2d 1124 (1983) also does not apply as it involves a determination that a governmental entity can enter into a contract to provide sewer facilities to another governmental entity and in doing so is acting in its proprietary capacity. A city breaching a contractual obligation to another entity is certainly acting in its proprietary capacity. Said case does not say the city utility is always acting in said capacity.

D. IF STORM AND SURFACE WATER DRAINAGE FROM CITY STREETS IS A GOVERNMENTAL FUNCTION, THE FEES BEING CHARGED ARE NOT TAXES IN COMPLIANCE WITH ARTICLE VII, SECTION 1 OF THE WASHINGTON STATE CONSTITUTION.

The City takes the position that even if disposing of storm and surface water from the city streets is a governmental action, the charges to the property owners comply with Article VII, Section 1 of the Washington State Constitution by being statutorily authorized and applied in a uniform manner. This requirement has been discussed in several cases: *Teter v. Clark County, WA*, 104 Wn.2d 227, 704 P.2d 1171 (1985); *Carillo v. City of Ocean Shores*, 122 Wn.App. 592, 94 P.3d 961 (2004); *Samis Land Co. v. City of Soap Lake*,

143 Wn.2d 798, 23 P.3d 477 (2001). The City also states in its brief that even if this Court determines the charges to utility customers for city created water runoff and the charges are actually taxes, the City complies with the rules regarding taxation in that they are administered in a systematic nondiscriminatory manner. The City cites *Sator v. Department of Revenue*, 89 Wash.2d 338, 572 P.2d 1094 (1977) and *Teter v. Clark County, supra*, to support its position. The position is not correct for several reasons. The charges are discriminatory in that they are based upon a condition having no relationship to the charge. If a property is entirely impervious, the property owner may be paying a tax based upon an equally impervious surface adjacent to its property (namely, paved city streets). On the other hand if the property has very little impervious surface, they are paying a much lesser portion of the burden created by an entirely paved surface. Therefore the charge is discriminatory in addition to not being based upon value. The city is neither correct in its claim that the charge in this case is uniform or statutorily authorized. Article VII, Section 1 of the Washington State Constitution states, "All taxes shall be uniform upon the same class of property..." Section 1 goes on to say that "All real estate shall constitute one class." Said class is based upon the value of the property being taxed. *University Village Ltd. Partners v. King County*, 106 Wn.App. 321, 23 P.3d

1090 (2001); *Belas v. Kiga*, supra; *Advanced Silicon Materials, L.L.C. v. Grant County*, 156 Wn.2d 84, 124 P.3d 294 (2005); *State ex rel. Morgan v. Kinnear*, 80 Wn.2d 400, 494 P.2d 1362 (1972). There is no claim by the Defendant that they assessed charges by value of the property. In fact, the City never made any claim until their appellate brief the charges could be considered a tax. *Belas v. Kiga*, supra, stated tax uniformity requires both an equal tax rate and equality in valuing the property taxed. Nowhere is it stated in any case that uniformity of value can be based upon the amount of impervious surface existing on property.

E. WHILE PROVIDING STORM AND SURFACE WATER DRAINAGE SERVES A REGULATORY PURPOSE WHEN DRAINING PRIVATE PROPERTY, THE SAME SERVICE PROVIDED TO PUBLIC STREETS WHEN PAID FOR BY PRIVATE PROPERTY OWNERS SERVES ONLY THE PURPOSE OF RAISING REVENUE.

The City claims the regulation of water sources is regulatory in nature and cites *Smith v. Spokane County*, 89 Wn.App. 340, 948 P.2d 1301 (1997); *Hillis Homes, Inc. v. Public Utility District No. 1 of Snohomish County*, 105 Wn.2d 288, 714 P.2d 1163 (1986); and *Teter v. Clark County*, supra, to support its position that all provision of water and sewer services have a regulatory purpose. Appellants/Plaintiffs do not contest sewer and water drainage services *may* have a regulatory purpose. However, like in *Okeson*, supra, and *Carrillo*, supra, provision of any utility may have dual purposes.

In *Okeson*, supra, the City of Seattle provided electricity to private property owners and charged a fee for said service. However, the City of Seattle also charged private property owners for street light use and that was determined to not have a regulatory purpose but was instead to raise revenue. In *Carrillo*, supra, the City of Ocean Shores charged a fee for private property owners who were not hooked up to the sewer system just for the availability of the service. The Court of Appeals determined that not to be a regulatory purpose in the particular instance of unimproved properties. In *Carrillo*, supra, the Court of Appeals distinguished *Teter v. Clark County*, supra, by pointing out that the property owners challenging the charges in *Teter*, supra, contributed to the burden of the water runoff and the need for a clean creek and lake together with flood control and as a result the fees were reasonably related to the land owner's contribution to the burden. *Carrillo*, supra. However, the *Carrillo*, supra, court stated the City of Ocean Shores never established how it used the availability fee to unconnected property owners. Likewise, in the case at hand, the City of Tacoma never established how the charges imposed upon private property owners reasonably related to the runoff of the city streets. See *Carrillo* at 606. *Okeson* takes a similar tact. *Okeson* stated at 553 there was no regulatory purpose because the electricity used by a city light customer has no relationship to the amount of energy used by the street

lights. Likewise in the case at hand, the surface water drainage needs created by a storm and surface water drainage utility customer has no relationship to the amount of surface and storm water created by city streets.

The case of *Smith v. City of Spokane*, supra, does not support Respondent/Defendant's position that the entirety of the city's utility that provides sewer and storm water drainage has a regulatory purpose. In *Smith*, charging a fee created by the state statute authorizing an aquifer protection area benefited all water users in the County of Spokane area. All private property owners were using water in the aquifer area and the benefit provided to the property owners for clean water had an appropriate regulatory purpose. Issues raised in the case at hand were not evident in *Smith v. Spokane County*. In *Hillis Homes, Inc. v. Public Utility District No. 1 of Snohomish County*, supra, property owners were being charged a connection fee to hook up to the county water lines. That obviously was for a regulatory purpose since the property owners were paying for a benefit directly being provided to their property. *Hillis* likewise does not have an application here since the issue of being charged for a government created burden was not discussed.

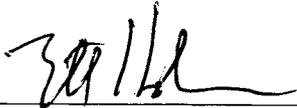
III. CONCLUSION

Plaintiffs/Appellants respectfully submit that this Court should reverse the trial court and grant Plaintiffs/Appellants summary judgment

or in the alternative to remand this case to the trial court for hearing on damages and attorney's fees.

Respectfully submitted,

DATED: October ¹² 10, EVERETT HOLUM, P.S.
2006

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DECLARATION OF
SERVICE

Everett Holum states:

I, Everett Holum, attorney for Appellant in the above-entitled cause of
action, over 18, competent to testify on the matters stated herein and do so

DECLARATION OF SERVICE - 1

ORIGINAL

based on personal knowledge.

On October 10, 2006, I filed an original and one true and correct copy of Appellant's Reply Brief and Declaration of Service at *The Court of Appeals of the State of Washington, 949 Market Street, Suite 500, Tacoma, Washington 98402*. In addition, I served one true and correct copy of Appellant's Reply Brief and Declaration of Service to *Debra Casparian, 747 Market Street, Rm 1120 Tacoma WA 98402-3767*.

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

DATED at Tacoma, Washington, on October 10, 2006.



Everett Holum